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ACTIONS.

1. When a judgment is absolutely null for defects patent on the face of the record, a suit for the recovery of property sold in execution of such judgment, is more properly a petitory action, and not one strictly of nullity, which, under the law, could only be brought before the same court which rendered the judgment. The demand in nullity, in such case, is only incidental and does not control the question of jurisdiction. Such an action of revendication of the property illegally seized and sold, can well be brought before any court of competent jurisdiction.

Mary C. Bledsoe et al. vs. M. P. Erwin et al., 615.

APPEAL.

1. Repeated applications for further time had been made by Appellant, supported by the Certificate of the Clerk of the lower Court, that it was necessary to complete the Transcript of Appeal; and the additional time asked for, was granted by this Court; when Appellee showed by the Certificate of the Clerk of the lower Court, that the Record to be transcribed was in the hands of Appellant's Counsel all the time that application was being made for further delay. Appellee moved, in making this showing, that the order for further delay be rescinded and the Appeal dismissed. *Held* that the order should be rescinded, but, as there is no Transcript and, therefore, no Appeal before this Court, there is none to dismiss. *Succession of Henry Kuntz*, 30.

2. This is a suit for $154, brought in the late Parish Court of the Parish of Iberville; judgment was rendered for said amount and an Appeal taken to the late Fifth Judicial District Court; after the adoption of the Constitution of 1879, the case was transferred to the 23rd Judicial District Court for the Parish of Iberville, organized under said Constitution.

Relator asks that the 23rd Judicial District Court, being without appellate jurisdiction in the matter, be ordered to dismiss the Appeal and issue execution on the judgment.

Held that under a proper interpretation and understanding of the provisions of the Constitution of 1879, the case is to be tried *de novo* by the 23rd Judicial District Court.

The State ex rel., Adrien Bonnet vs. Samuel Mathews, Judge ad hoc, 103.

APPEAL—Continued.

3. An extension of time of thirty days being granted by this Court, to file the Transcript of Appeal, the Appellant on the day after the thirtieth day of the extension allowed, applied for additional time: *held* that the application is too late, and the Appeal should be dismissed. *Paul Lacroix vs. Martial Bonin*, 119.

4. A Motion in this Court, before the case is on trial, to strike out of the Transcript of Appeal documents alleged to have never been offered in evidence, is without precedent and will not be entertained. *The State ex rel. Jacob Meyers vs. Board of Liquidation*, 124.

5. On the last day for applying for an extension of time to file the Transcript, the Appellant filed his application in the Clerk's office, the Court not being in session. Five days after, the Court being in session, granted the time asked for. *Held* that this time is to be computed from the day the application was filed in the Clerk's office. *Eugene Chrétien vs. Benjamin Poincy*, 121.

6. This Court will dismiss the Appeal *ex officio* when there is no copy of the judgment appealed from, in the Transcript.

When the Appellant goes to trial on an insufficient Transcript, without suggesting a diminution of the record, and the Appeal is, therefore, dismissed, he shall not be permitted, after the judgment of dismissal, to complete the Transcript.

A rehearing will not be granted in such a case.

The right of parties before this Court, under agreement of Counsel, to supply the deficiency of the Transcript, must be exercised *before* and possibly *during* submission, but surely not *after judgment*. *Henry Bacas vs. Thomas Smith*, 139.

7. A judgment of the late Parish Court of the parish of St. Mary, passing upon the constitutionality of a certain municipal ordinance of Morgan City, was appealed from directly to this Court and the Appeal dismissed on legal grounds. The present Relator then obtained an Appeal from the said original judgment of the Parish Court to the Court of Appeals of the Fifth Circuit, which also dismissed that Appeal. This is an application for a *Mandamus* to compel the latter Court to try the case. *Held* that the dismissal of the Appeal by this Court rendered the judgment of the Parish Court final. *The State ex rel. Morgan City vs. Judges, etc.*, 151.

8. The Appeal in this case was made returnable on the first Monday of November. A rule was taken in the lower Court by Appellee to have the order of Appeal set aside for cause. Pending this Rule, Appellant filed the Transcript in this Court, in September, before the return day. In October, the rule was made absolute and the order of Appeal set aside by the lower Court. *Held* that the Appeal comes to this Court without any order and should be dismissed. *Chas. S. Sthele vs. Sarah M. Millspaugh*, 194.

APPEAL—Continued.

9. A motion to dismiss for incompleteness of the Transcript or any mere informality, must be made within three judicial days after the filing.

When an appeal is dismissed for failure of the Appellant to file the transcript in time, it shall be considered as abandonned, and he shall not afterwards be allowed to renew it.

A *Curator ad hoc* appointed to represent an absent defendant, has no right to abandon the Appeal taken by him.

Neuville Bienvenu vs. Factors' and Traders' Insurance Co., 209.

10. The surety on an Injunction bond, against whom no damages were prayed for, or granted, in the lower court, is not a necessary party in this Court, and absence of citation of appeal to him is no cause of dismissal of the Appeal.

An Appeal shall not be dismissed when the Transcript is filed after the Appeal Term, but within the extension of time granted by this Court. *Widow Caroline Tilton vs. Joseph Vignes et al.*, 240.

11. An appeal does not lie from a preliminary Injunction *pendente lite*.

Town of Donaldsonville vs Police Jury, 248.

12. In the absence of any name as payee of the Bond of appeal, this Court will consider the Bond payable to the person to whom the law makes it so, to wit: the Clerk of Court; and will not dismiss the Appeal on that ground.

Miss Kate Nugent vs. John McCaffrey, 271.

13. The "contribution" which the Board of Levee Commissioners is authorized by law to levy upon all lands protected by the levees etc., is not a "tax, toll or impost," within the meaning of the Constitution. Affirming previous Decisions.

The question of the legality of such contributions will, therefore, not be considered by this Court in a case in which the amount involved is below its appellate jurisdiction.

Board of Levee Commissioners vs. Lorio Bros., 276.

14. The matter in dispute in this case being the difference between the value put upon Plaintiffs' property by the Assessor and that put upon it by the Plaintiffs themselves, and that difference being less than $1000, this Court has no jurisdiction. The constitutionality and legality of the tax itself are not at issue.

Gillis & Kennett vs. Clayton, Assessor, 285.

15. This is an Appeal from a judgment decreeing the nullity of a tax sale of a tract of land. Nothing in the record shows the value of the land. The appeal is, therefore, dismissed. It must appear affirmatively and clearly, from the amount of the matter in dispute, that this Court has jurisdiction.

Heirs of Amos Adams vs. Heirs of J. B. Starks et al., 304.

APPEAL—Continued.

16. The order of a District judge recusing himself and directing a case to be tried by the judge of an adjoining District, instead of by an attorney of the bar as judge *ad hoc*, is an interlocutory decree, which can cause no irreparable injury, and from which, therefore, no appeal lies.

The consent of both Appellant and Appellee cannot vest this Court with jurisdiction.

Widow John Fields vs. J. A. Gagné and wife, 339.

17. Appellant obtained an order for both a suspensive and devolutive appeal, but failed to file the transcript on the return day. Within the year, however, he obtained another order for a devolutive appeal, and then filed the bond and Transcript.

Held that this second appeal is valid and that Appellant's failure to perfect the first appeal is not an abandonment thereof.

Mrs. M. J. Bowie vs. S. M. Davis, 345.

18. In the extension of time granted by this Court for filing the Transcript of appeal, days of public rest should be counted.

An agreement entered into *before* the return day, by which citation of appeal is waived and considered as served in due time, cannot be construed as a consent that the Transcript be filed after the legal delays, and a renunciation on the part of the appellee of the right to move the dismissal of the appeal on that ground.

O. A. Pierce, Kenyon, assignee, vs. W. L. Cushing et al., 401.

19. A party who pays the amount of a judgment against him, by compulsion and under protest, cannot be considered as acquiescing in the judgment and be thereby deprived of his right of appeal. Decision in 29th An. 762 affirmed.

The surety on an injunction bond, though constructively in court, should be notified of the judgment rendered against him, if he filed no answer or actual appearance, and, in default of such notice, he is always in time for a suspensive appeal.

The same surety inasmuch as the case was tried without his appearance and virtually *ex parte*, as to him, is entitled to the maintenance of his appeal even if the Transcript is defective by the fault of the plaintiff in the case, the other appellant.

The failure of an appellant to perfect his suspensive appeal by giving bond within the legal delay, does not deprive him of his right to a devolutive appeal within the year.

In the absence of written evidence in the record, and the assignment of errors being insufficient, the neglect of the appellant to have asked for and obtained a statement of facts, will cause the dismissal of the appeal.

Pierre Verges vs. Gonzales, Sheriff, et al., 410.

APPEAL—Continued.

20. This Court will take notice *ex proprio motu* of the unappealable amount of the matter in dispute before them, and dismiss the appeal. *Schmidt & Ziegler vs. A. C. Brown and R. Strauss*, 416.

21. An appeal bond, which does not contain the condition that the appellant shall prosecute the appeal, and which is not given to secure the payment of the costs of both the Supreme Court and the inferior Court, is defective and invalid.
John Rawle, agent, vs. Mrs. E. M. Feltus and husband, 421.

22. Although the jurisdiction of the lower Court ceases when the order of Appeal has been granted and the bond filed, yet the Court retains its power over its Clerk to compel him to fulfil the ministerial duties of his office, in the case.
The State ex rel. C. L. C. Cass vs. J. T. Clark, Clerk, 422.

23. A suspensive appeal from a judgment dissolving a preliminary injunction and rendered on a Rule *nisi*, does not deprive the defendant of the right of having the case tried on the merits in the lower Court, even where the injunction is the sole relief sought by the plaintiff.
The State ex rel. Butchers' Union, etc., vs. Judge, etc., 436.

24. The case being fixed for trial on the merits in this Court, whether or not the bond is sufficient for a suspensive appeal, the Appellee has no interest to have the appeal dismissed as suspensive, inasmuch as the case would still remain in this Court on the devolutive appeal. *Heirs of Stafford vs. Henry Renshaw*, 443.

25. It is no good cause of complaint for the Appellant and no ground of dismissal, that three appeals taken by different parties in the same case, be embraced in one Transcript.
Insufficient service of citation of appeal, not attributable to the Appellant, should not cause the dismissal of the appeal.
Mrs. Mary Murphy vs. Factors' and Traders' Insurance Co. et al., 454.

26. In an Appeal by third persons, the failure to cite the defendant in the case is fatal and will cause the dismissal of the Appeal.
Mrs. H. Escoubas et al. vs. Calcasieu Sulphur Co., Musson et als., Appellants, 484.

27. An interlocutory order, which dissolves an injunction, on a bond for the amount of damages claimed by the Plaintiff in injunction, cannot work an irreparable injury and is, therefore, not appealable.
George Osgood vs. J. W. Black et al., 493.

28. The fact that a judgment was rendered at chambers, does not exempt the case from the operation of Art. 574 C. P., which provides that no citation of appeal shall be necessary when the appeal has been granted upon motion in open court, at the same term that the judgment was rendered.

APPEAL—Continued.

When the acts enjoined amount to a trespass or a change of possession of immovable property, the injunction cannot be dissolved on bond and an appeal lies from the dissolving order. Decision in Sigur vs. Judge, 33 An. 133, affirmed.

Jean Torres et al. vs. Felix Falgoust, 560.

29. The fault is attributable to Appellant, in case of an incomplete Transcript, when it is by his directions that the Clerk has omitted some of the documents offered in evidence.

Article 898, C. P., does got protect Appellant against the consequences of an incomplete Transcript and a clearly defective Certificate of the Clerk, when he takes no steps whatever to remedy the deficiencies of his appeal before the Motion to dismiss is submitted. It has been the constant practice of this Court, under such circumstances, to dismiss the appeal.

Heirs of Jacob Hoover vs. Z. York et al., executors, 652.

30. Two appeals having been granted to the same appellant, the appellee moved the dismissal of both : of the first appeal, for alleged irregularities, and of the second on the ground that the first order having once been granted and a bond thereunder filed by appellant, the lower court was divested of jurisdiction and had no authority to issue the second order. *Held* that, if the first order of appeal was illegal, the lower court was not divested of its jurisdiction over the case and could legally issue the second order.

It has never been held in Louisiana that a party must move for a new trial in a jury case as a condition precedent to his appeal, though it is, as a general rule, proper that he should do so.

To take away the right of appeal, there must be an unconditional, voluntary and absolute acquiescence in the judgment rendered, on the part of the appellant.

Mrs. M. F. Jackson, Adm., vs. Wm. C. Michie et al., 723.

31. An issue which was not raised in the lower Court and is made for the first time in the brief of Counsel in this Court, shall not be noticed or passed upon. *Ib.*

32. Act No. 21 of the Legislature of 1878, chartering the Louisiana Western Railroad Company, and giving it, (sec. 6,) the right to embrace several landholders as defendants in one expropriation suit, does not make the judgment in the premises appealable, on the score that the aggregate amount allowed to all such defendants, exceeds $1000, though the amount allowed to each respectively, is less than that sum.

The proceeding in such case cannot be assimilated to a *concursus* of creditors.

The Act in question did not and could not, under the Constitution, attempt to regulate the jurisdiction of this Court.

APPEAL—Continued.

The consolidation of two distinct suits between the same parties, in each of which the matter in dispute is less than $1000, does not vest this Court with jurisdiction.

Louisiana Western R. R. Co. vs. Hopkins, Kennedy et al., 806.

33. When an appeal is dismissed on motion of the Appellee, on the ground that the Transcript was not filed within the legal delay, though the appellee did not himself bring up the record for the purpose of dismissal under Articles 588-590, C. P., the Appellant shall be considered as having abandoned his appeal and shall not be permitted afterwards to renew it.

O. A. Pierce, Kenyon, assignee, vs. W. L. Cushing et al., 809.

34. When the Appellant files a supplemental petition for the purpose of having one of the Appellees cited, who had been omitted in the original petition of appeal, no additional bond needs be furnished. The original bond in favor of the clerk of court will suffice.

Illegal service of citation of appeal, not attributable to the Appellant, will not cause the dismissal of the appeal.

Although the proper and regular mode of perfecting the Transcript, is by a writ of *Certiorari*, it is useless to issue such writ when certified copies of the missing documents have been filed. Affirming the rule in City of Baltimore vs. Parlange, 25 An. 335.

J. Borde vs. Widow Erskine et al., 873.

35. Appellant not having asked that all the Defendants and Warrantors be cited as Appellees, the Appeal must be dismissed.

The want of proper parties in this Court will be noticed at any time, in any form of suggestion and, even, *ex mero motu*.

Widow and Heirs of J. B. Baird vs. Simpronius Russ, 920.

36. Appellant having made no objection to try in the Court below a Rule to rescind the order of appeal, as improvidently granted because the judgment appealed from was rendered by consent, the District Judge did not exceed the bounds of his jurisdiction in making the Rule absolute and rescinding the order of appeal. This Court will not, therefore, control his action by Prohibition. The proper remedy, in such a case, is by appeal from the rescinding order. *The State ex rel. Mrs. Fairex vs. Judge, etc.*, 927.

37. The judgment appealed from, being rendered against all the Defendants indiscriminately and without severance, and being, therefore, indivisible, and proper showing being made in this Court that one of said Defendants was dead at the time the judgment was rendered and the appeal taken, it is ordered, on Motion of the legal representative of the dead Defendant, that the judgment be set aside and the case remanded to the lower court for the appearance of proper parties.

Mrs. S. E. Myers, Adm. et al. vs. T. G. and F. E. Brigham, 1013.

APPEAL—Continued.

38. This is an injunction suit to prevent the seizure and sale of homestead property worth $6000. The judgment, of which execution is enjoined, is for $1076. *Held* that the matter in dispute is the homestead property, and the claim is below the appealable amount, necessary to give this Court jurisdiction.

John Guss vs. Routon, Sheriff, et al., 1046.

39. The amount of the claim, and not that which may be proved, is the test of the jurisdiction of this Court.

Eliza P. Hendricks, wife of T. Woods, husband, 1051.

40. Appeal dismissed by this Court *ex propio motu*, the matter in dispute being less than $1000. When third persons enjoin the seizure and sale of property, it is the value of the property which vests this Court with jurisdiction, and not the amount of the judgment enjoined. Re-affirming previous Decisions.

Meyer, Weiss & Co., vs. Logan, Sheriff, et al., 1054.

41. When a judgment by Default has been taken against one of two Defendants, the other Defendant having filed an Answer, and, after trial of the case, Plaintiff's demand is rejected and he appeals, the Appellees cannot pretend that there is no judgment as to the Defendant who made no appearance and that, as he is a necessary party, the Appeal should be dismissed.

H. D. King, Administrator vs. Wm. T. Atkins et al., 1057.

42. The test of the jurisdiction of this Court in an action to enjoin and annul a judgment, is the amount of the judgment itself.

The appealable amount of the matter in dispute necessary for the jurisdiction of this Court cannot be reckoned by the cumulation of plaintiff's demand and defendant's claim in reconvention.

J. W. Smith vs. Merchants' Insurance Co., 1071.

43. Appellees seek to recover judgment against Appellants for $234, and to annul a transfer of property made by Appellants for more than $1000. *Held* that the matter in dispute is the right of Appellees to submit the property to the judgment for $234, and th t this Court has no jurisdiction.

Loeb & Bloom vs. J. Arent et als., 1085.

44. In a suit in which the Plaintiff claims $964, and the defendant admits his indebtedness to the amount of $600 the matter in dispute is the difference between these two sums, and the case is, therefore not appealable.

A seizing creditor, whose judgment for $964, is enjoined, cannot, upon dissolution of the injunction and rejection of his claim for the statutory damages, appeal to this Court on the ground that the damages, added to the amount of the judgment, make up the appealable sum. *F. P. Stubbs vs. McGuire, Sheriff, et al.*, 1089.

APPEAL—Continued.

45. The Clerk's defective Certificate is cured by the agreement of Counsel that, "the Transcript, as made out, is sufficient."

Huey & Wise vs. Police Jury, etc., 1091.

46. An Appeal taken by Motion in open court, being defective because the amount of the bond was not fixed by the judge, cannot be subsequently perfected by an order fixing such amount, rendered at chambers on the Petition of Appellant.

G. A. Fournet vs. J. Van Wickle, 1108.

47. The submission of the controversy in this case to arbitrators, was made with the understanding that they should have power to act as amicable compounders. Under the law (Art. 460, C. P.), the judgment of the Court rendered upon the award, cannot revise it. It follows that the judgment itself is not appealable.

T. B. Hopkins vs. Louisiana Western R. R. Co., 1138.

48. An Appellant should not be prejudiced by the error committed by the judge in fixing the return day of the Appeal.

State of Louisiana vs. J. Dellwood, 1229.

49. The fact that the appeal bond is signed by only one of several appellants, does not vitiate the appeal, in as much as, under the settled jurisprudence of the State, such bond is valid even if not signed by the appellant.

J. Murrell et al. vs. Mary E. Murrell et al., 1233.

50. This Court cannot take cognizance of evidence outside of the Transcript, in support of the charge of Appellant's acquiescence in the judgment appealed from. The case must be remanded for the purpose of such investigation.

It is only when the fact alleged on one side is expressly admitted on the other, that the remanding is unnecessary. The jurisdiction of this Court in such cases clearly defined.

When an Appeal is taken from the decree of a State Court ordering the removal of the case to the United States Circuit Court under the laws of Congress, and the Appellant himself files the Record in the Federal Court and there moves for the dissolution of the Injunction granted by the State Court, there is an acquiescence by the Appellant in the judgment appealed from and the Appeal will be dismissed by this Court.

New Orleans City Railroad Company vs. Crescent City Railroad Company, 1273.

51. In the additional delay granted the Appellant to file the Transcript, the last two days not being legal days should not be counted, and he is in time if he files the Transcript on the first legal day thereafter.

APPEAL—Continued.

This Court will not pass upon objections to the admissibility of evidence, if the Transcript does not show that the Court below ruled upon the objections and the ruling was properly excepted to for review. *E. J. Gueringer vs. His Creditors*, 1279.

52. No Appeal lies from an order transferring a case from one to another Division of the Civil District Court for the Parish of Orleans, because such order is interlocutory and cannot cause an irreparable injury. Affirming Decision in 31 An. 47.

S. Hernsheim & Bro. vs. I. Levy & Co., 1283.

53. The Court below having sustained the Exception to its jurisdiction and refused to hear and determine the differences between the parties, this Court can only pass upon the said Exception and cannot, in this Appeal, decide the other issue of the case.

Mrs. H. R. Mellor vs. T. Gilmore, Executor, 1404.

54. An Appeal cannot be dismissed on the ground that it was taken by a tutrix, defendant in the case, and that her wards were of age at the time and should have taken the Appeal themselves,—when the Record does not show that said wards were made parties to the suit at their majority.

Mrs. B. Lewis, et al. vs. Widow J. F. Pepin, tutrix, 1417.

55. Though the name of the surety is not inserted in the body of an Appeal bond, the fact that such surety has signed the bond under the name of the principal, is sufficient.

Union Bethel Church, &c., vs. Civil Sheriff, et al., 1461.

ATTACHMENT.

1. On the dissolution of an Attachment issued on the ground that the debtor was about to dispose of his property with intent to defraud his creditors, when the attaching creditor acted without malice and solely under the legal advice of an experienced attorney, the Defendant shall recover the damages actually sustained and no more.

Damages actually sustained, comprise not only pecuniary loss and actual expenses incurred, such as costs and counsel fees, but also the mortification, annoyance and vexation caused to the Defendant by the Attachment.

M. L. Byrne & Co. vs. L. H. Gardner & Co., 6.

2. Plaintiff having acquired certain movable property, partly in payment of a debt due him, partly for cash, and having received possession of the same and then hired it to the transferror, the creditors of the latter cannot attach it by a direct seizure as his property.

Art. 240, C. P., No. 4, is not intended to enable the attaching creditor to dispense with the revocatory action when there has been a *real* sale of the debtor's property, even if fraudulent, and to seize said property directly, as if the sale were simulated.

ATTACHMENT—Continued,

The fact that, in the attachment suit, the said purchaser signs the bond of the defendant to release the property, does not preclude him from asserting his ownership.

Hugo Redwitz vs. E. Waggaman, Sheriff, et al., 26.

3. Whether or not a garnishee had the *legal* control of the funds of the debtor in attachment, he is liable to the seizing creditor, if in point of fact, he did control such funds and disposed of them after notice of the garnishment.

Semble that property of the debtor in attachment, coming into the hands of a garnishee *after* notice of garnishment, is affected by the seizure.

H. Buddig vs. Mrs. L. Simpson, E. C. Palmer, garnishee, 375.

ATTORNEYS-AT-LAW.

1. The graduates of the Law Department of the University of Louisiana must obtain a license from the Supreme Court before they are admitted to practice, as attorneys-at-law, in any court of the State. Section 112 of the Revised Statutes does not make their diploma the equivalent of a license; and they are liable to the Clerk of this Court, under section 756, Revised Statutes, for his fee of $10, for a certificate of admission. In the present case, the applicant having been admitted to practice in all the courts of the State, by order of this Court, the object of the required license has been fulfilled, and such order is equivalent thereto.

O. Villeré vs. Clerk, etc., 998.

BANKRUPT LAW OF THE UNITED STATES.

1. Drafts drawn by a planter against the proceeds of cotton in the hands of his factor, accepted by the latter and not paid by him at maturity, but taken up and paid by the drawer, do not constitute a fiduciary debt, excepted as such from a discharge in bankruptcy under the law of the United States.

Assuming that the original obligation of the factor was of a fiduciary character, about which there is a diversity of opinion, it is clear that it ceased to be so by the drawing and accepting of the drafts, which changed the nature of the debt and were payable to the holder. *Samuel C. Baines vs. R. L. Adams, et al., 46.*

2. Under the Bankrupt law of the United States, a duly certified copy of the Assignment is conclusive evidence of the title of the assignee, and of his authority to sue, without his having to prove the various steps in the bankruptcy proceedings.

Such assignee has the right to sue in the State Courts.

The adjudication in bankruptcy dissolves attachments of the bankrupt's property taken within four months.

T. J. Wooldridge, Assignee, vs. F. Rickert & Co., et al, 234.

BANKRUPT LAW OF THE UNITED STATES—Continued.

3. Under the late bankrupt law of the United States, the property of the bankrupt could legally be sold free of encumbrances, by order of the Federal Court, provided the mortgage creditors were properly notified to show cause why it should not be done.

In default of such notice, the mortgages or privileges on the property were unaffected by the sale.

Therefore, when the mortgage creditor, who was notified, bought the property at the sale ordered by the Court, his mortgage was extinguished by confusion, but he took the property subject to the mortgage of the creditor, who was not notified to show cause why the property should not be sold free of encumbrances.

Such purchaser is a third possessor, not liable to a personal judgment on behalf of the mortgage creditor, but against whom the latter has an action of indemnification for the value of any part of the thing mortgaged, which has been deteriorated or taken away, if the property is not sufficient to satisfy the mortgage.

The purchaser in such case, is not entitled to be reimbursed the taxes on the property and other expenses paid by him, with priority over the mortgage creditor with the pact *de non alienando*. Under the pact, the vendee has no better right than the vendor, the original mortgagor.

Mrs. Mary Murphy vs. Factors' & Traders' Insurance Co., et al., 454.

4. A debtor in bankruptcy, under the Composition Act of Congress of 1874, has sufficiently complied with the requirements of the law when being ignorant of the name of the holder of his promissory note, he has given in his schedule a full description of the note, stating the date, amount, maturity and to whom payable.

A suit subsequently filed by the holder against such debtor, averring the ownership of the note, does not affect the Composition proceedings and does not impose upon the bankrupt the duty of amending his schedule. *Paul Fourchy vs. Bayly & Pond*, 778.

5. A debtor, who has been adjudicated a bankrupt under the bankrupt law of the United States, when sued in the State Courts, can interpose his plea at any time before judgment. Such defense need not be heard *in limine*, under the rules of pleading of our State law. *H. Block vs. L. Fitchoe*, 1094.

BILLS AND NOTES.

1. The Defendant in this case is the accommodation endorser of the note of a married woman, authorized by her husband. The holder did not have it presented and protested at maturity. Plaintiff charges that Defendant is liable both as surety and as endorser, and in the latter capacity though the note was not presented and

BILLS AND NOTES—Continued.

protested. Defendant pleads she is not a surety and has been discharged as endorser for want of demand and protest. *Held* that, under the circumstances of the case, Defendant is liable as endorser, although the note was not demanded and protested. Full exposition of the law governing the case, like this, of the endorsement of a note for which the maker is primarily not liable.

Pierre Butler vs. Mrs. Cora A. Slocomb, 170.

2. The endorser, who waives protest and notice before maturity, binds himself absolutely by a new contract, and payment of interest by him will interrupt prescription, as to him, even if the drawer's obligation were extinguished by prescription.

Union National Bank vs Succession of Thomas B. Lee, 301.

3. A promissory note may be antedated.

Union Bethel Church, etc., vs. Civil Sheriff et al., 1461.

BOARD OF LIQUIDATION.

1. Having obtained judgment from the District Court against the Board of Liquidation, declaring certain State bonds and warrants legal, and ordering the funding of them, under Act No. 3 of 1874, and the judgment of the District Court not being appealed from, the Relator applied for a Mandamus to compel the Board of Liquidation to fund said bonds and warrants, and issue in their stead the Consolidated Bonds provided for by law.

Held that, under Act No. 11 of 1875, the Board of Liquidation is to fund bonds or warrants, the legality of which is questioned, only after said bonds or warrants have been declared legal and valid by the Supreme Court; and, therefore, the judgment of the District Court, though final, is not, under the special provision of said law, binding upon the Board of Liquidation.

The relator himself, though the judgment of the District Court was in his favor, had the right to bring said judgment up for review by this Court, to meet the express and special requirement of the Statute.

The State ex rel. Jacob Meyers vs. Board of Liquidation, 124.

BURDEN OF PROOF.

1. The burden of proving seasonable and proper notice of the loss by fire, under the terms of the policy of insurance, or valid reasons for not giving such notice, is upon the insured.

W. J. McCall vs. Merchants' Insurance Company, 142.

2. Suit by sheriff against Calcasieu parish for his fees. His account being approved by the Clerk and presiding Judge of the Court, under Sec. 1042 Rev. Sta., the burden of showing illegal charges is on the Parish. *D. H. Lyons vs. Parish, &c.*, 1170.

CERTIORARI.

1. A party who has sanctioned the proceedings he complained of, cannot have the same avoided through a writ of *Certiorari*. C. P. art. 864.

State of Louisiana ex rel., Zubberbier & Behan vs. Judge, &c., 15.

CESSIO BONORUM.

1. In default of proper evidence in the Record, to show the value of the services of the notary, of the Counsel of the syndic and of the Attorney of absent creditors, in the Estate of an Insolvent, this Court will not disturb the judgment of the District Judge, which has fixed the respective amounts due for such services.

The syndic may, in behalf of the mass of creditors, question the validity of the claims set up by certain creditors in opposition to his Account and Tableau of Distribution.

The charge of undue preference may be made by opposition, in the *concurso* of creditors, and needs not necessarily be made by means of the revocatory action.

The prescription of one year to the action in avoidance of a fraudulent confession of judgment, only begins to run from the time that knowledge of said confession is brought home to the party injured thereby.

The rule of law in revocatory actions, that only such creditors can attack the validity of an act giving an undue preference, whose claims were in existence at the time of the illegal act, does not apply to a contest for the classification of claims in a *concurso* under insolvent proceedings.

The law does not prohibit a creditor, who pays an actual and effective value at the moment of the contract, from obtaining a privilege or security, because he has reasons to suspect the inability of his debtor to pay all his debts.

Nor does the law forbid a creditor holding such security to obtain the privilege by seizure, provided for in Art. 722 of the Code of Practice. *M. L. Byrne & Co. vs. Their Creditors*, 198.

2. The duties and powers of the syndic of an insolvent succession are the same as those of syndics of insolvent debtors; he must preserve the assets under his charge from loss by prescription; and for that reason, he is authorized to issue execution on a twelve months bond.

The illegality of his appointment cannot be inquired into collaterally and does not affect the validity of his official acts. Previous Decisions affirmed.

Emile Cloutier et al. vs. R. E. Lemée, provisional Syndic, et al., 305.

3. An extrajudicial surrender of his property, made by a debtor to his creditors, especially when some of the latter refuse to accept it, does

CESSIO BONORUM—Continued.

not divest him of the title to that property, and the creditors who declined the surrender have the right to sue the debtor and seize and sell his property, notwithstanding the extrajudicial surrender.

Liquidators of Hart & Hébert vs. Bates, Sheriff, et al., 473.

4. Foreign creditors, having contracted with citizens of Louisiana whilst its Insolvency Laws were in force, cannot claim in the State Courts an exception from the operation of those laws; and an order of a State Court, accepting a *cessio bonorum* and staying further proceedings against an insolvent, will arrest the action of such foreign, as well as of home creditors.

Orr & Lindsley vs. Lisso & Scheen, 476.

5. The title of the insolvent is not divested by the *cessio bonorum*, and his heirs are not estopped from claiming the property surrendered. when it has not been disposed of by the syndic. 11 An. 158.

Walling Heirs vs. A. S. Morefield, 1174.

6. The foreign assignee or trustee of an insolvent Corporation, suing a debtor in this State, cannot urge against the latter's reconventional demand, that the same is equivalent to pleading compensation against an insolvency.

Life Association of America vs. S. Levy, 1203.

CHARITY HOSPITAL OF NEW ORLEANS.

1. The Charity Hospital of New Orleans, originally founded by the private bounty of Don Andrés Almonaster y Roxas, became, by Acts of the Legislature since the year 1811, a State Institution.

As such, it is owned by the State, and, whether or not the title to the property from which it derives revenues for the charitable purposes of its creation, is literally in the State, that property is, at all events, held in trust by the State for the use of those intended to be benefited by the Institution.

Under the laws organizing said Charity Hospital of New Orleans, its property is not liable to seizure and sale under execution.

State of Louisiana vs. G. R. Finlay & Co., et al., 113.

CITATION.

1. Citation addressed to the wife and husband to assist her, and served upon the wife in person, is legal.

Widow A. Holt et al. vs. Liquidators of Hart & Hébert, 673.

CITY COURTS OF NEW ORLEANS.

1. The City Courts of New Orleans can entertain jurisdiction of suits for the ejectment of tenants.

The Sheriff, who has seized property occupied by lessees, has authority to institute such ejectment proceedings before said City Courts in proper cases.

State of Louisiana ex rel. Fredricks vs. Judge, etc., 146.

CITY COURTS OF NEW ORLEANS—Continued.

2. The City Courts have no jurisdiction of a suit involving the right of possession of immovable property. Therefore, they have no authority to eject an alleged trespasser from a house, when the relations of the parties are not those of landlord and tenant

The State ex rel. J. Buisson vs. Judge, etc., 419.

COMMUNITY OF ACQUETS AND GAINS.

1. The title to one-half of the Community property is vested in the heirs of the deceased wife at the moment of her death, and it is not necessary for them, when they claim it, to allege that the Community is liquidated and solvent. Decisions in 25 An. 379, and 26 An. 639, overruled. Decision in 32 An. 848, affirmed.

W. B. Glasscock vs. C. G. Clark, 584.

2. The earnings of a married woman in keeping a boarding-house, during the existence of the Community of acquets and gains, fall into and belong to the said Community. Therefore, a transfer of property made by her husband to her, in payment of her claim against him for the restitution of such earnings, is null and void.

H. M. Isaacson vs. J. H. Mentz et al., 595.

CONTRACTS.

1. A factor having bound himself to make certain advances to a planter to enable him to raise his crop, and having taken collateral securities for the reimbursement of the sums to be advanced, is not released from his engagement by the fact that the planter's place is subsequently overflowed. The refusal of the factor to continue the advances for that reason, will entitle the planter to damages.

But the planter having made a settlement with the factor and taken back the collateral securities without any protest or reservation, must be considered as having waived his claim for damages.

Frank M. Taylor vs. Prestidge, Graham & Co., 41.

2. Plaintiff having based his suit upon the allegation of a contract of employment of his professional services and of a *fixed* compensation for the same, cannot be permitted to prove the value of those services before or without proving the contract itself.

Under the authorities, after proving the alleged contract of employment, if he failed in the further proof of the alleged stipulated fee, he might then be allowed to show the value of the services; but this is not intended to supply the indispensable evidence of the alleged contract itself, in default of which he cannot recover.

George L. Bright vs. The Metairie Cemetery Association, 58.

3. When the officers of a municipal corporation, clothed with legislative functions and having in the exercise thereof, legislative discretion, exceed their power, by error of judgment, in a contract with a party, who had the same means of information as themselves

CONTRACTS—Continued.

about their capacity to contract, and fell in the same error,—the said officers are not personally responsible to the other contracting party, for the non-performance of the contract.

If an action lay in such case against the municipal officers personally, it would be *ex delicto* and prescribed in one year.

M. A. Southworth vs. B. J. Flanders et al., 190.

4. The agreement between the holder of a mortgage note and an attorney-at-law, that the latter shall foreclose the mortgage, receive for his fee, the commission stipulated in the act of mortgage, and warrant his client that he will receive from the sale of the property the full amount of his debt, is a valid and binding contract of suretyship, with a sufficient consideration. But the holder of the mortgage note, by subsequently taking it back from the hands of the attorney-at-law, and receiving the price the property brought at a sale ordered by the United States Bankrupt Courts, cancels the obligation of the attorney-at-law under the said agreement.

Charles E. Alter vs. Hornor & Benedict, 243.

5. To convert a proposition by one party to another into a contract, it is not sufficient to show strong probability that it was or would have been accepted, under certain circumstances: acceptance, actual, final and irrevocable, must be proved.

Geo. W. Stockton vs. Firemen's Insurance Co., 577.

6. Nullity of the title, in execution of which a compromise was made, can only be invoked, as a cause of rescission, when the title was falsely supposed to be valid, through error of fact, not through error of law. *Widow V. Dugas vs. Town of Donaldsonville*, 668.

7. The bonds sued upon having been issued in settlement, by compromise, or former claims against the municipal corporation, as in the preceding case of Widow Viléor Dugas vs. The Town of Donaldsonville, the fact that the original claims were prescribed when the new bonds were issued, is no defense to an action on said bonds.

V. Maurin et al. vs. Town of Donaldsonville, 671.

8. This is a suit against the payees of two checks, in the body of which it was declared by the maker, that they were given in payment of corn bought from said payees and that the money to be paid by the bank was an advance on exchange sold to it. *Held* that the payees of the checks were not privy to the declarations contained therein and were not bound by them.

Citizens' Bank vs. L. Grand et al., 976.

9. A long settled account will not be opened and disturbed unless upon clear and positive evidence that the settlement was made in error of material facts or by fraud or undue influence.

CONTRACTS—Continued.

If there were error in the settlement, but the same resulted from the gross negligence of the party complaining, he is not entitled to relief.

The fact that one of the parties to the settlement was addicted to drunkenness will not invalidate the agreement, when it is not proved that the other party took advantage of a moment of intoxication.

Settlements are contracts.

M. Keough et al. vs. C. W. Foreman, 1434.

CONSTITUTIONAL LAW.

1. The Plaintiff's demand in this case is virtually a proceeding against the State, levelled at her property and seeking by judicial compulsion the payment of her obligations.

For this purpose, the Auditor and Treasurer have no power to stand in judgment as her agents, when she has, in her Constitution, expressed her will adversely to such payment.

Therefore the State is not represented in this action, though the same is directed against her property.

The State could not be made a party to such proceedings without her consent.

The immunity of the State of Louisiana from suit in her own courts is absolute, and cannot be encroached upon by judicial proceedings, directly or indirectly, against herself or against her agents.

The Courts of Louisiana have no jurisdiction to entertain any judicial proceeding the object of which is to enforce the performance of any contract or obligation of the State, against her will.

Those Courts have no authority to declare that a provision of the State Constitution does not express the will of the State.

Those Courts have no power to annul or disregard a provision of the State Constitution on the ground that it impairs the obligations of a contract, except when the question is presented in some suit in which the enforcement of that contract is demanded and in which it can be enforced.

Those Courts have no power to annul a provision of the State Constitution on the ground that it impairs the obligations of a contract with the State, because such a contract can never become the subject of judicial enforcement against the will of the State.

The State ex rel. S. J. Hart vs. E. A. Burke, Treasurer, et al., 498.

2. Act No. 19 of the Legislature of 1876, appropriating the sum of $7850 for the payment of the expenses of a joint committee of the Senate and House of Representatives appointed in 1875 for the purpose of examining the books and accounts of the StateAuditor and Treasurer, is violative of the Third Constitutional Amendment of

CONSTITUTIONAL LAW—Continued.

1874, which provided that the revenue of each year should be devoted to the expenses of the same year.

John Klein & Co. vs. Johnson, Auditor, 587

3. When, under the provisions of Article 132 of the Constitution of 1868 and Act No. 40 of 1869, a plantation was divided into lots of from ten to fifty acres, but, at the sale, the auctioneer announced that he would offer one lot first and that the purchaser would have the privilege of taking the other lots at the same price, and the sale was made accordingly,—the mandate of the law that such lots be sold separately, has not been obeyed, and such sale is null and void.

J. Borde vs. Widow Erskine, et al., 873.

4. Act No. 118 of the Legislature of 1869, (incorporating the Crescent City Live Stock Landing and Slaughter-House Company), was clearly within the police powers of the State, and was a valid and legal enactment of the General Assembly. 23 An., 545 ; 16 Wallace, 36.

But such an Act of the Legislature cannot bind the State : the rights therein granted are revocable at the will of the sovereign, and the grantee holds nothing, indeed, but a license subject to abrogation by future constitutional and, even, legislative action. 101 U. S., 814.

Such a charter does not create a contract between the State and the grantee, protected from impairment by the Constitution of the United States.

Article 258 of the Constitution of 1879 has clearly abrogated all the monopoly features or exclusive privileges created by said Act No. 118 of 1869.

Crescent City Live Stock Co. vs. City of New Orleans, 934.

5. Act No. 84 of the Legislature of 1878, (authorizing police juries to prohibit the sale of liquors on Sundays, in the various parishes of the State), is violative of Article 114 of the Constitution of 1868, because all the objects of the law are not expressed in its title. Said Act is, therefore, unconstitutional, null and void. Decision in 31 An. 663, overruled.

The same law is also invalid and null, for delegating to the police juries, in the manner and form resorted to, the authority of the General Assembly to legislate, and that of the State to prosecute for the commission of the offense so provided for.

State of Louisiana vs. Mrs. S. Baum, 981.

6. Under the provisions of Article 130 of the Constitution, any one of the five judges of the Civil District Court for the Parish of Orleans, has the power of issuing interlocutory orders, besides conservatory

CONSTITUTIONAL LAW—Continued.

writs, in any cause pending in said Court, in case of absence, sickness or other disability of the judge to whom such cause was originally assigned.

By the terms of the same Article of the Constitution, the judge to whom a cause has been assigned, has alone the power of rendering judgment on the merits of the case. But the Constitutional direction is not one of public order, and does not strike with absolute nullity such a judgment when rendered by any other of the five judges. The parties to the suit themselves may consent that the judgment be so rendered. Therefore, a judgment rendered by another judge than the one to whom the cause was assigned, in case writs of absence or other disability of the latter, may be valid, if no timely opposition or objection is made thereto.

The State ex rel. Buisson vs. Lazarus, judge, etc., 1425.

CORPORATIONS.

1. A corporation which, by its charter, can only act through its board of directors, cannot be bound to contracts by its president, without the authorization of the board, unless it is in acts of simple administration which, of necessity, should be done without that authorization.

George L. Bright vs. the Metairie Cemetery Association, 58.

2. The "Crescent City Rifle Club" is not a Corporation. It was organized under the law providing for the creation of Corporations for "literary, scientific and charitable purposes." The declared object of said association does not fall within the purview, the letter or the spirit, of the law relied upon. Rifle shooting is not a science, though it may be an art.

The fact that one of the Defendants, the president of said association, was not aware of the keeping of the bear on their premises, does not exonerate him from liability.

V. Vredenburg et al. vs. W. J. Behan et al., 627.

3. A corporation is entitled to have its trade-mark as well as a private individual, and may sue for its infringement.

Insurance Oil Co. vs. John H. Scott, 946.

4. A Corporation created under the laws of a sister State, has the right to sue and stand in judgment in the Courts of Louisiana.

When such a Corporation has been decreed insolvent and an assignee or trustee appointed to it, under the laws of, and in, the State where it was created, the assignee or trustee so appointed has the right to sue for the assets of the insolvent Corporation and stand in judgment in the Courts of Louisiana.

Life Association of America vs. S. Levy, 1203.

CORPORATIONS—Continued.

5. The investment of the profits of Insurance Companies in loans secured by mortgage, cannot be considered as banking business and is not prohibited by law. *Ibid.*

6. A member of a Corporation, who is a creditor thereof, has the same right as any other creditor, to sue the Corporation and attach its property. *Ibid.*

COSTS.

1. The Defendant in a suit brought by the State of Louisiana in her own courts, cannot require her to furnish security for costs. *The State vs. Succession of R. Taylor*, 1270.

COUNSEL FEES.

1. A fee of $700, for the services of Counsel in maintaining a will, which controlled the disposition of an estate of $16,000, is not excessive. *Succession of Mrs. Ella Roth*, 540.

COURTS OF APPEALS.

1. The amount in dispute being more than $200 and less than $1000, the Court of Appeals is commanded by Mandamus to entertain jurisdiction and try the case. Same reasons as in Winter & Hunter vs. the Judges of the Court of Appeals of the Second Circuit, decided at same term. *The State ex rel. Merchants' Insurance Co., vs. Judges, etc.*, 1070.

2. The amount in dispute in this case being more than two hundred and less than one thousand dollars, the Court of Appeals is commanded by Mandamus to entertain jurisdiction and try the case. Similar to Lemle vs. Routon, Sheriff, et al., decided at the same term. *The State ex rel. Winter & Hunter vs. Judges, etc.*, 1096.

3. The Court of Appeals has no jurisdiction in a proceeding of which the object is to have the inscription of a mortgage for more than $1000 cancelled and erased from the books of the Mortgage Office, on the ground that said mortgage is simulated. *The State ex rel. Bloss vs. Judges, etc.*, 1351.

COURT OF APPEALS FOR PARISH OF ORLEANS.

1. A case decided by the late Sixth District Court for the Parish of Orleans, in January, 1880, in which the demand was for less than $500, could not be appealed from to the Court of Appeals after the organization of the latter. In default of provisions in the Constitution of 1879, for an appeal under such circumstances, the judgment of the District Court was final. *The State ex rel. McGee, Snowden & Violett vs. Judges, etc.*, 180.

2. The Court of Appeals for the Parish of Orleans has jurisdiction of cases in which the amount involved is exactly $1000, exclusive of interest. *The State ex rel. Widow Harper vs. Judges, etc.*, 358.

CRIMINAL LAW.

1. A Motion in arrest of judgment should be denied when made on the ground, that the charge to the jury was given orally by the judge after Counsel for the accused requested it should be in writing, though the request was withdrawn before the charge was given, and though the judge had announced his readiness to grant the request. *State of Louisiana vs. Willis Hopkins*, 34.

2. In a criminal prosecution for larceny, it is sufficient to lay the title of the property stolen in the ostensible or apparent owner of it.

And for the purpose of such prosecution, cattle at large in the woods or prairies, must be considered as in the possession of the owner.

The Proviso of Act No. 36 of 1880, allowing the State three peremptory challenges for each defendant, is unconstitutional, under Article 29 of the Constitution, because the object of the Proviso is not expressed in the title of the law.

State of Louisiana vs. William Everage, et al., 120.

3. An accomplice of the accused is a competent witness for the State even when he has pleaded guilty, if he has not yet been sentenced, and if he and the accused against whom he testifies, are tried separately.

The accused may be legally convicted on the uncorroborated testimony of the accomplice, because the jury is sole judge of his credibility.

The accused having gone to trial without objection, cannot, after conviction, object to the time when the copy of the indictment and list of the jury were delivered to him.

It is not necessary to make a separate conclusion, in each case, in a single count, in an indictment.

The concise endorsement of the character of the offense upon an information or indictment is for convenience only and forms no part of the substance of the charge, and cannot be objected to by the accused. *State of Louisiana vs. Walter Russell, et al.*, 135.

4. The accused being present in court during the trial, and the jury having retired and returned after a short time with their verdict, it will be presumed that the accused was also present in court at the rendering of the verdict and judgment. If, in point of fact, the accused was not present when it is presumable he was, the burden of proving his absence rests on him.

The information is not defective for duplicity because it contains a description of the manner in which the crime was committed, and, for that purpose, mentions a minor offence punishable by a different statute.

State of Louisiana vs. James Collins and Simon Kinney, 152.

CRIMINAL LAW—Continued.

5. The District Court having admitted the testimony of a convicted felon, notwithstanding the Defendant's objection, the verdict of the jury must be set aside and a new trial granted, although the objectionable witness testified he knew nothing about the case.

State of Louisiana vs. Hamp Mullen, 159.

6. Evidence is admissible of an offer to compromise made by the accused, and of the reply thereto from the prosecuting witness, when the accused was not induced by threats or promises to make the offer.

The voluntary declaration made by the accused before the committing magistrate, is admissible against him on his trial for larceny.

State of Louisiana vs. Jackson Bruce, 186.

7. An indictment for murder is not defective because it does not state the time at which the deceased died, when it states the day on which the wound was inflicted, which caused the death of said deceased. The averment is sufficient even if a number of days elapsed between the infliction of the wound and the death.

State of Louisiana vs. Fred Hobbs, 226.

8. The failure of the Record to show the presence in court of a prisoner charged with felony, at every important stage of the proceeding, is a fatal defect.

The fact that the judge repeated his verbal charge to the jury in the absence of the prisoner's Counsel, also vitiates the proceedings and entitles the accused to a new trial.

State of Louisiana vs. George Davenport, 231.

9. It is no legal ground of complaint for the accused, that the judge, in his discretion, excused some jurors of the regular *venire*.

When the jury of talesmen ordered by the judge is exhausted, he has the authority to order a second or third, or more, if necessary.

After the legal foundation has been established, verbal evidence is admissible of the dying declarations of the deceased.

Verbal evidence is also admissible of the statement of the deceased, that his physician informed him he was going to die.

The testimony of the sheriff is admissible to show that the accused, through Counsel, waived his right to be present in court during the trial of his Motion for a new trial.

State of Louisiana vs. John Somnier, 237.

10. Act No. 42 of 1871, providing for the punishment of "any officer or *other person*, charged with the collection, receipt, safe-keeping, etc., of public money, who shall convert it to his own use, etc." clearly covers the case of the Administrator of Finance of the Ci y of New Orleans, guilty of such an act.

State of Louisiana vs. John P. Exnicios, 253.

CRIMINAL LAW—Continued.

11. It is left to the sound discretion of the District Judge to determine what time should be allowed Counsel appointed by him to defend the accused, for the purpose of preparing his defense; and also to grant or refuse an application for a continuance on that score, made on the day of trial. *State of Louisiana vs. David Wilson*, 261.

12. The accused is not entitled to a continuance on account of the absence of a witness summoned by the State.

A remark made by the judge about a witness of the State, before any of the jurors are called or empanelled, could not operate to the prejudice of the accused, and does not entitle him to a new trial.

The words of a person present during the commission of the offense, uttered at that moment, are admissible in evidence as part of the *res gestæ*. *State of Louisiana vs. Jordan Horton*, 289.

13. In a prosecution for assault with intent to commit robbery, the accused is not entitled to such a charge to the jury as, that "the evidence must show that the prisoner laid hands on the party against whom the offence was charged to have been committed, or demanded his money."

The offence may be proved in other ways.

The jury in criminal cases being the sole judges of the evidence, the accused is not entitled to the unqualified charge, that "five witnesses of good character, who are unimpeached, are entitled to greater credit than one witness who swears differently."

This Court will not review the action of the Judge *a quo*, in criminal cases, on Motions for a new trial involving questions of fact or matters resting largely within his discretion, unless the record discloses, and the Court is properly informed, that the ruling complained of was arbitrary and clearly illegal.

State of Louisiana vs. Louis Breckenridge, 310.

14. Counsel for the State, in a criminal prosecution, has the right, on the cross-examination of one of Defendant's witnesses, to ask him what "the feelings are between him and one of the State's witnesses," though nothing on this point was said in the examination in chief. The question is permissible as testing the credibility of the witness.

The judge, in his charge to the jury, in saying that the State must prove the guilt of the accused beyond all reasonable doubt, to the exclusion of every other *hypothesis*, may use the word *conclusion* instead of hypothesis. There is no legal difference between the two expressions. *State of Louisiana vs. Louis Willingham*, 537.

15. Copy of indictment and list of jurors have to be served on the accused two days before trial but not before arraignment. Previous Decisions affirmed.

CRIMINAL LAW—Continued.

The granting of a continuance is within the legal discretion of the Court *a quo*, with which this Court will not interfere without manifest cause.

So of the refusing of a new trial to the accused.

Arson at Common law and in this State.

It is excluded from the prescription of one year.

Accused is, under no law, entitled to a Commission to take the testimony of witnesses residing in another State.

State of Louisiana vs. Wm. M. Fulford, 679.

16. Sections 841, 842 and 843 of the Revised Statutes, providing for the punishment of the crime of arson, discussed and construed.

The indictment in this case is sufficient under said section 843, without negativing the exception mentioned in the statute.

Under the order of the Court below that "witnesses for the State and the accused were to be sequestered," the accused should not have been deprived of the testimony of some of his witnesses, who were not in court when the order was made and only presented themselves the day after.

A witness of the State, on the cross-examination, having been asked what his feelings were towards the accused and having answered that they were bad and unfriendly, Counsel for the State had no right, on the re-examination in chief, to ask the witness to state the reasons of his animosity.

A witness may be examined on the cross-examination as to matters not embraced in the direct examination, when it is only for the purpose of testing his credibility. State vs. Willingham, 33 An. 537, affirmed. *State of Louisiana vs. Jos. Gregory et al.*, 737.

17. Act No. 98 of the Legislature of 1880, providing for the organization of the Criminal District Court for the Parish of Orleans, etc., is not unconstitutional on the score that it violates article 29 of the Constitution, which prescribes that every law shall embrace but one object, and that shall be expressed in the title.

Though the accused were charged with murder, it was permissible for a witness to state that he heard one of the Defendants say, in presence of the others, that they were going to rob the deceased. The fact that such witness was an associate of the accused may affect his credibility, but not his competency. The statement was admissible also, to prove the declarations of the accused as to a circumstance having a bearing on the question of their guilt. As all the accused were present when the declaration was made, none of them can object to the statement of the witness.

CRIMINAL LAW—Continued.

It was proper and legal, in order to show the motives of the accused for committing the murder, to admit in evidence the Inventory of the succession of the deceased, which proved that he had in his house a certain amount of money.

The Motion for a new trial, based on the ground that the evidence was insufficient to convict, cannot be reviewed by this Court, as it has no jurisdiction of the facts in criminal cases.

A Motion for a new trial, on the ground of newly discovered evidence, should not be considered by the Court, when such Motion contains no sworn-to allegation that due diligence was used to procure the same evidence on the first trial.

State of Louisiana vs. John Crowley et als., 782.

18. A juror is not incompetent when he swears on his *voir dire*, that he has formed an opinion on the guilt or innocence of the accused, but that his opinion could be overcome by the evidence, and he thought he could do justice in the case, between the State and the accused.

Error in the charge of the judge to the jury, in stating an abstract principle not arising out of the evidence and nowise relating to the cause, does not entitle the accused to a new trial.

A question, which does not appear by the record to have been raised in the proceedings in the Court below, and which is presented for the first time by the argument of Defendant's Counsel before this Court, shall not be noticed and passed upon.

State of Louisiana vs. Charles Johnson et als., 889.

19. The accused cannot complain that the list of jurors served on him, contained the names of the whole panel drawn for the term of court, including the grand jurors, &c., if said list designated those who were to serve during the week in which his case was to be tried.

The accused, having gone to trial without objection, cannot, after verdict, contest the legality of the drawing of the grand jury by which he was indicted.

State of Louisiana vs. Jerry Washington, 896.

20. The offence charged is sufficiently described in the indictment, when it is averred that the accused did *wilfully* and *feloniously* shoot and wound * * * with the intent * * * wilfully, feloniously and *of his malice aforethought* to kill, etc. The charge of *malice* in the shooting as well as in the intent to kill, is not indispensable.

State of Louisiana vs. Thomas Bradford, 921.

21. It is enough that the minutes of the court show that the Information was filed with the consent of the court; it needs not appear on the face of the Information itself.

CRIMINAL LAW—Continued.

When the accused has not requested the court to assign Counsel to defend him, under the statute, he cannot complain that none was assigned to him, and make it the ground of a new trial.

State of Louisiana vs. Viscounte de Serrant, 979.

22. When the Minutes of the Court do not show that the indictment was found by the grand jury and presented in open court, the verdict and judgment must be set aside and a new trial granted to the accused.

This case presents a glaring instance of an imperfect and incomplete record, to the detriment of the public interest.

It is not sacramental that the prisoner should be asked if he has anything to say why sentence should not be pronounced; and the absence of this formality will not vitiate the proceedings.

It is no sufficient ground for a challenge for cause that, in answer to the question of the District Attorney, the juror said he had some prejudice against convicting on circumstantial evidence.

State of Louisiana vs. Jake Shields, 991.

23. This Court cannot review a verdict and judgment of the court below, on the ground that Appellant is charged in the indictment with having committed the offence on the 19th of March, 1880, and the evidence shows that the offence was committed on the 19th of March, 1881. Were this Court to review such evidence to ascertain whether the averment in the indictment was or was not properly sustained by the proof, it would be trying the case on appeal *as to the facts.* *State of Louisiana vs. H. Polite*, 1016.

24. The Record showing that the District Attorney, *with leave of the court*, filed the indictment, etc., the legal presumption is that the leave of court was first obtained.

The Record showing that the accused was in court when his trial commenced, the burden of proof is on him to establish that he was not present at the rendering of the verdict, if such were the fact.

It is competent for the District Court to have its Minutes corrected *nunc pro tunc*, before they are approved, to show the preceedings as they really and truly took place.

State of Louisiana vs. S. L. Cox, 1056.

25. Evidence of the dangerous character of the deceased, in a charge of murder, is not admissible in justification of the accused, on account of threats and hostile demonstrations made by the deceased prior to, and disconnected from, the time of the killing, unless followed by some assault or hostile demonstration on the immediate occasion of the killing, tending to produce upon the mind of the ac-

CRIMINAL LAW—Continued.

cused the impression that he was in instant danger, which could only be averted by the killing of his adversary.

State of Louisiana vs. Henry Jackson, 1087.

26. The Clerk of court and two jury commissioners, forming a quorum under the law, the *venire* drawn by them will not be considered illegal for want of the presence of the other two commissioners.

The refusal of the judge to grant a continuance to the accused to procure certain witnesses, was, under the circumstances of the case, within his sound discretion.

A juror is competent, though he answered upon the direct examination, that he had formed an opinion respecting the guilt or innocence of the accused, if, on examination by the judge, it appears from his answers that his opinion was formed from rumors, that he is without bias or prejudice, and that he can decide the case according to the evidence, without regard to what he previously heard.

State of Louisiana vs. E. Hornsby, 1110.

27. Under the circumstances of this case, justice required that a continuance and reasonable time to procure the attendance of his witnesses, should be granted the accused. The refusal of the same by the court *a qua*, entitles him to a new trial.

An indictment charging larceny in one count, and receiving stolen goods in another, is valid; but under a single count charging larceny, a conviction of receiving stolen goods cannot be maintained.

State of Louisiana vs. G. Moultrie, 1146.

28. The certificate of the Clerk of Court from which a case is transferred, in a change of venue, attached to the copy of the original proceedings, such as the indictment, arraignment and plea, etc., not being stamped with the seal of the Court, is clearly inadmissible in evidence on the trial of the accused in the Court to which the case has been transferred.

The introduction on the trial of legal evidence of such proceedings had before the change of venue, being indispensable, the trial, verdict and judgment are illegal and must be set aside, and a new trial granted to the accused.

State of Louisiana vs. H. J. Brown, 1151.

29. The accused, under the charge of larceny, having waived the trial by jury, and, after being tried by the Court and found guilty, having obtained a new trial, has the right *then* to change his former election and claim to be tried by the jury.

State of Louisiana vs. W. Touchet, 1154.

30. Under Sec. 1056, Revised Statutes, the verdict of the jury is good, though omitting the words: "not guilty of embezzlement",—and containing only the words "guilty of larceny".

CRIMINAL LAW—Continued.

Under the same section, the information is sufficient in charging the accused with embezzlement as "agent" merely.

State of Louisiana vs. H. R. Poland, 1161.

31. In an Indictment for perjury, it is indispensable to aver before which Court or authority the offense charged was committed, and also that the officer who administersd the oath to the accused, was competent to do so. *State of Louisiana vs. S. Harlis*, 1172.

32. The description of the thing stolen, in an information for larceny, being: "One hog, the property of A. B.," is sufficient.

Act No. 35 of 1880, providing for the trial of offenses in certain cases, has only one object set forth in its title and is constitutional.

It is competent for the Legislature to change the *manner* of criminal trials regardless of the time of the commission of the offense, without redering the act in which such change is made, obnoxious to the Constitution. *State of Louisiana vs. H. Carter*, 1214.

33. The verdict of the jury is not vitiated by the fact that it is signed by the foreman, without the usual addition of "foreman," appended to his sig ature.

An indictment is not bad because it contains two counts charging the accused, in one, with severing certain produce from the soil of another person, and, in the other, with stealing said produce. The two offenses are of such kindred nature that they may be charged in the same indictment.

But the indictment is defective in only charging that the article severed from the soil was part of a crop "produced" by A. B., &c. The averment of *ownership* of the soil from which the produce was severed, is indispensable under the statute.

State of Louisiana vs. M. Sheppard, 1216.

34. The provision of the Constitution that the accused in criminal prosecutions shall have the right to be tried by a jury, does not prevent said accused from waiving the jury and electing to be tried by the court only.

Act No. 35 of 1880, providing for the trial of offenses in certain case, is not repugnant to any article of the Constitution.

The Court *a qua* justly refused the application of the Defendant for a new trial, based upon the ground of newly discovered evidence and accompanied by the affidavit of the person who was stabbed by the accused, stating that he, (the accused), was drunk at the time of the assault and did not know what he was doing.

State of Louisiana vs. J. White, Jr., 1218.

35. The Judge of a District Court has no right to refuse leave to the District Attorney to file an information, on the ground that, in his

CRIMINAL LAW—Continued.

opinion, the statute under which the prosecution is instituted, is unconstitutional.

The State ex rel. Hall, District Attorney, vs. Judge, etc., 1222.

36. Under section 790, Rev. Sta., "thrusting" a person may well include thrusting with "an iron bolt, rod or pin," whether the point be sharp or not. *State of Louisiana vs. D. Lowry*, 1224.

37. Under the present Constitution, the accused in criminal cases, in which the punishment of death or imprisonment at hard labor *may be* inflicted, is entitled to an appeal to this Court, whether the verdict of the jury or judgment of the lower court is or not for a lesser punishment. Similarity on this point between the Constitutions of 1852 and 1879, and difference with that of 1868. 14 An. 649.

The State ex rel. Gabriel vs. Judge, etc., 1227.

38. The accused had the right to prove by a competent witness, that another person, accused with him of having stolen a hog and convicted on a separate trial, had asked him just before the time of the alleged offense, "to go and help him to get his hog." The circumstance was part of the *res gestæ*, and the evidence admissible to show the absence of the *animus furandi*.

State of Louisiana vs. T. Dellwood, 1229.

39. The accused has the right to waive the constitutional provision of the trial by jury and elect to be tried by the Court. Decision in State vs. White, just rendered, affirmed.

It is not necessary that the Parish in which the offense was committed, should be named in the body of the indictment. The law provides that it is sufficient that it should be named in the margin of that instrument.

The Record showing that the prisoner was *formally* arraigned, the legal and necessary inference is, that he was *present* at the arraignment.

In cases not capital, it is not indispensable that the prisoner be asked if he has anything to say why sentence should not be pronounced. Affirming State vs. Taylor, 27 An. 393.

The presence of the accused during the trial is sufficiently shown by the Record. State vs. White, also affirmed in this particular.

State of Louisiana vs. H. Askins, 1253.

40. It is not material, in a prosecution for larceny, that the Information should state the exact day of the commission of the offense, provided the proof shows that it was committed within one year of the filing of the Information. This is not an open question any longer.

Nor is the allegation of ownership of the thing stolen material in cases of larceny. Affirming decision in 33 An. 120.

State of Louisiana vs. W. Kane, 1269.

CRIMINAL LAW—Continued.

41. The accused having pleaded not guilty upon a first arraignment and, upon trial, the jury not agreeing and being discharged, a second arraignment took place, when the accused pleaded guilty and was sentenced by the Court; *held* that the proceeding was legal and that no formal withdrawal of the first plea of not guilty was necessary.

It is no more an open question in Louisiana that, in an Indictment under a statute providing a punishment for the commission of a common law offense, it is insufficient to charge the offense in the statutory terms alone, but all essential averments in an Indictment at common law for the same offense are necessary. Therefore, forgery being a common law offense, not defined in our statutes, and a felony at common law, the omission of the word *feloniously* in the Indictment vitiates the proceeding.

State of Louisiana vs. J. H. Flint, 1228.

42. An indictment is not bad for duplicity, in charging conjunctively in the same count, both an offense and the intention of committing the same, when the two are denounced disjunctively in the statute. This is not an open question any longer.

State of Louisiana vs. T. Richards, 1294.

43. In a trial for murder, proof of threats made by the deceased against the accused, is not admissible when the threats were not communicated to the latter. *State of Louisiana vs. T. Fisher,* 1344.

44. When a venire has been regularly drawn, the failure to summon a juror, resulting from mere mistake or error on the part of the officer, without fraud or collusion, and without material injury to the accused, is no sufficient cause to quash the panel.

State of Louisiana vs. Joe Dozier, etc., 1362.

45. It affords no ground of challenge to the array, that the names of deceased and incompetent persons were placed in the box, or drawn therefrom. The accused can only take advantage of it by a challenge to the poll. The incompetency of one of the Grand Jurors cannot be urged by the accused after he has pleaded to the indictment and been convicted, in the absence of averment and proof that he, (the accused), only knew of the incompetency after trial and conviction. *State of Louisiana vs. J. Wittington,* 1403.

46. A venire drawn by a majority of the Jury Commission, in the absence of a member who has not yet qualified, is legal and regular.

State of Louisiana vs. A. Wells, 1407.

47. In a criminal prosecution where two defendants are jointly on trial, the State is entitled to six peremptory challenges for each twelve

CRIMINAL LAW—Continued.

challenges to which such defendants may be entitled. Act No. 24 of 1878 is not unconstitutional and governs this point.

The presence of the accused in court is not necessary during the filing, trial and disposition of a motion for a new trial. Previous Decisions affirmed. *State of Louisiana vs. N. Green et al.*, 1408.

48. The law provides no delay for arraignment after indictment or information, and the accused is required to plead when arraigned, which is his only time as of right.

The excusing of a juror by the Court, even if the latter committed an error in so doing, cannot be taken advantage of by the accused. *State of Louisiana vs. Jake Shields*, 1410.

49. Alleged errors or irregularities in the drawing of jurors cannot invalidate the panel, unless fraud has been practiced or some great wrong committed.

A juror, charged with an offence, such as assault and battery, not punishable by hard labor, is not incompetent.

The appointment of the foreman and the verdict itself may both be verbal.

The verdict being written: "guilty of mansluder," for manslaughter, is valid.

The sentence is legal though the accused was not asked by the Court if he had any thing to say why it should not be passed. Previous Decisions affirmed. *State of Louisiana vs. W. Smith*, 1414.

CURATOR *AD HOC*.

1. The terms Curator *ad hoc*, *Attorney ad hoc* and Advocate, when used with respect to an absent defendant, all equally indicate the person appointed by the Court to defend him, and no real distinction exists between them.

Neuville Bienvenu vs. Factors' and Traders' Insurance Co., 209.

2. The Curator *ad hoc* appointed to represent an absent defendant, having in his answer prayed for a fee to be taxed in his favor, and, on the trial of the case, evidence having been offered to show the value of the Curator's services, contradictorily with the plaintiff, the judgment rendered in favor of the defendant and taxing the Curator's fee, shall be binding on the plaintiff for the payment of said fee. No special notice of the trial of the Curator's claim for said fee needs be given under such circumstances. *Mrs. M. F. Bowie vs. S. M. Davis*, 345.

3. A Curator *ad hoc* of a minor cannot waive citation. *Julie Cormier, Adm. vs. T. De Valcourt, Admr.*, 1168.

DAMAGES.

1. On the mere *quantum* of damages, this Court will not disturb the judgment of the Court below, unless the amount is manifestly excessive or clearly unsupported by evidence.

Hugo Redwitz vs. E. Waggaman, Sheriff, et al., 26.

2. Case of contributory negligence on the part of the injured party. Re-affirmance of the principle, that the party inflicting the injury is not liable in damages, in such cases, even if he is also at fault.

Gabriel Childs vs. New Orleans City Railroad Company, 154.

3. Punitory or vindictive damages on account of a suit by injunction alleged to have been brought through malice and without probable cause, shall not be granted without clear and positive proof of the malice and want of probable cause.

The dissolution of an injunction is *prima facie* evidence of an injury sustained by the party enjoined, and entitles him to actual damages. *E. Conery et al. vs. Temple S. Coons et al.*, 372.

4. The fact that defendant in a suit for damages for malicious prosecution, acted under the advice of Counsel, is no excuse if the advice was given upon his misrepresentations of the circumstances of the case.

The admission or proof that such defendant is an upright and honest man, incapable of making a false oath, is not inconsistent with the charge of malice.

Malice may be inferred from the total want of probable cause.

Probable cause means reasonable ground of belief, supported by circumstances sufficiently strong to warrant a cautious man in that belief, that the accused is guilty of the offense charged.

The prosecutor may have been honest, and may have actually believed in the truth of the affidavit made by him, and yet be liable for damages, if he acted without reasonable cause.

Valmont Decoux vs. Pierre Lieux, 392.

5. The doctrine of contributory negligence should not be carried to the point of holding the injured party not entitled to damages, on account of acts of his employees, which are not connected with their employment.

The responsibility of persons who keep ferocious animals is of such strict and grave character as not to be relieved or modified by the ordinary considerations which regulate claims for damages. The very keeping of such animals is an unlawful act and, therefore, the injury done by them when they get loose, gives rise to an action for damages under all circumstances.

When persons sued to be made liable for their acts, seek to escape such liability by pleading some privilege or immunity in derogation

DAMAGES—Continued.

of common right, they must clearly establish the existence of the same, and bring themselves strictly within the provisions of the law on which they rest such claim.

The charge of the judge *a quo* to the jury, that "damages can be claimed by the heirs of the deceased for the loss of his life," is clearly erroneous. A number of adjudications of this Court declare that no such action lies in favor of the heirs. The Act of 1855, amending Article 2315, C. C., expressly limits their right to such action as the deceased himself would have had for damages had he survived the injury.

V. Vredenburg et al. vs. W. J. Behan et al., 627.

6. Malice may be inferred from want of probable cause for the arrest of a debtor, and, therefore, needs not be proved, though the presumption is subject to rebuttal.

It is only where there exists a probable cause and the arrest is effected under the advice of learned Counsel, consulted in good faith and on correct information of the facts, that a party can be exonerated from damages on the plea that he acted under legal advice.

Simon Block vs. Meyers & Levy, 776.

7. In an action for slander, it is not necessary to prove any special damage suffered by the Plaintiff, when the language used against him by the Defendant, is in itself libellous.

Moses Lobe vs. George W. Cary, 914.

8. The mere fact that the accused, under a criminal prosecution, has been acquitted, does does not entitle him to damages against the prosecutor; and he should recover none, when the evidence shows that there was a probable cause for the prosecution, and no malice on the part of the prosecutor.

J. A. Godfrey vs. T. and L. Soniat, 915.

9. Under the provisions of the Relator's Charter, as well as the Code of Practice, this Corporation can be sued for trespass, out of his domicil and in the Parish in which the trespass has taken place.

The word *trespass*, used in the Charter of the Company was employed by the Legislature in its broadest sense, so as to comprehend a variety of wrongs, whether direct or indirect, in which force was used, and not in the technical sense of the Common Law term.

The legal distinction between *trespass* and *trespass on the case* cannot be made in the premises.

The Company may be sued for damages for the killing of a mule, in any parish in which the act was done.

The State ex rel. Morgan's R. R. Co., vs. Judge, etc., 954.

DAMAGES—Continued.

10. This Court will not disturb the verdict of the jury as to the amount of damages found by them, in a case where the appreciation of such damages is essentially within their province.

W. J. Buford vs. C. M. Tidwell, 1053.

11. A party may allege fraud in his pleadings, in a civil suit, for the purposes of his case, without thereby rendering himself liable in damages for slander, when he has made the charge in good faith, without malice and under a state of things from which the fraud could reasonably be inferred. The authorities on this point reviewed. *Benito Vinas vs. Merchants' Insurance*, 1265.

12. Charges of dishonesty against the Parish Attorney made in good faith and in the discharge of their official duties by members of the Police Jury, do not render them liable in damages for libel.

J. Fisk vs. L. Soniat et al., 1400.

13. The sheriff, and not the seizing creditor, is answerable for damage suffered by property under seizure, when the latter is not charged with privity.

E. Latiolais, Adm. vs. Citizens' Bank, 1444.

DEPOSIT.

1. A claim for the recovery of an irregular deposit is only prescribed by ten years.

Money received by the wife as a deposit, with the knowledge and consent of the husband, constitutes a debt of the community, for which he is liable.

J. P. Cousins vs. H. L. Kelsey and Wife, 880.

2. The Bank of Commerce sent to the Southern Bank for collection three checks on other banks in New Orleans. They were collected and the proceeds passed to the credit of the Bank of Commerce in its *general* account, as it had given no instructions for any special disposition of the money, but, on the contrary, drew against the proceeds of those checks, as an ordinary depositor. On the same day that the checks were collected, the assets of the Southern Bank were seized by the Sheriff, and Receivers were appointed. The Bank of Commerce claims in this case the *restitutio ad integrum* of the proceeds of its three checks. *Held* that this bank was an ordinary depositor of the Southern Bank; that the proceeds of the three checks were mixed with its general funds, and the Bank of Commerce is no more than an ordinary creditor.

The State ex rel. Girardey vs. Southern Bank; Bank of Commerce, Opponent, 957.

DOMICIL.

1. A Defendant, sued out of the Parish of his domicil, may legally ap-

DOMICIL—Continued.

pear and stand in judgment. Decisions in 31 An. 88; 30 An. 595, and 29 An. 194, affirmed.

In an action of nullity of judgment on the ground that Defendant was sued out of his domicil, the record showing that the judgment was not rendered on default, and there being no evidence before this Court to establish that Defendant did not cure by appearance and plea the illegality of citation, the presumption of *omnia rite acta* must prevail and the judgment must stand.

J. A. Stevenson vs. Whitney, Tax Collector, et al., 655.

2. An action brought against a District Attorney to have his office declared vacant, on the ground that he has changed his residence and has none in the State, is a suit against him in his personal capacity, and not in his official character, in as much as he is alleged to have ceased to be district attorney. The suit must, therefore, be brought in the parish in which he resides or resided last, under the provisions of the Code of Practice, and cannot be brought indifferently in either of the parishes composing the district of the office.

The State ex rel. Eagan, Attorney General, vs. Hiram R. Steele, 910.

3 Difference between domicil and residence. *Ibid.*

DONATIONS *INTER VIVOS.*

1. An onerous donation, when the value of the thing given does not exceed by one-half that of the charge imposed, is not subject to the rules prescribed for donations *inter vivos;* and an action for its dissolution must be governed by the rules relating to ordinary contracts.

Therefore, as in a suit for the rescission of a contract, in which the plaintiff must put, or offer to put, the defendant in the same position in which he was before the contract, in the case of an onerous donation, the donor or his representative, who seeks the rescission of the donation, must offer to return what he has received from the donee, as a condition precedent of the suit.

E. N. Pugh, Executor, et al. vs. Mrs. Mary J. Cantey et al., 786.

2. The donation made by the father to the common child, out of the community property, will be considered as made by both husband and wife when, after the father's death, the mother accepts the community. Previous Decisions affirmed.

V. H. Dickson and husband vs. H. P. Dickson et als., 1370.

DONATIONS *MORTIS CAUSA.*

1. When a testator, after bequeating by his will a certain claim against his debtor, exchanges with the latter the original evidence of the debt for his bond or other evidences of indebtedness, the legacy is not revoked by implication, under the Code of Louisiana.

Succession of Patrick Irwin, 63.

DRAINAGE TAX.

1 The claim of the City of New Orleans on an alleged judgment *in personam* for drainage taxes, against a person whose succession was opened in the Second District Court for the Parish of Orleans, was properly before said Court for recognition, classification and payment by the Executors.

Such a judgment is only prescriptible by ten years from its rendition.

Act No. 30 of the Legislature of 1871 could not constitutionally, under the title of "An Act to provide for the drainage of New Orleans," provide for the creation of a new drainage District and still less for the institution of *extraordinary proceedings* to coerce payment of drainage taxes. The title of that Act was not indicative of such and other objects of the statute.

Judgments obtained by the summary proceedings provided for, in that law, are null and void. *Succession of Patrick Irwin*, 63.

ELECTIONS.

1. The Courts have undoubtedly the right to inquire into, and pronounce upon the validity of the returns of election.

As decided by this Court in the case of Duson vs. Thompson, 32 An., 861, irregularities in election returns do not *per se* vitiate the election; and in default of such legal returns, extrinsic evidence should be resorted to, in order to ascertain and decree the real result of the election.

The sworn officers charged by the law with the returns of election, are presumed to perform their duties with fidelity and honesty, and this presumption can only be overcome by positive evidence and not by mere suspicion of fraud.

H. McKnight vs. A. V. Ragan, 398.

ESTOPPEL.

1. Creditors, who accept a voluntary assignment from their debtor, or the latter's property, at a certain appraised value, much exceeding the amount of their claims, are estopped, in the absence of error or fraud, from afterwards alleging the insolvency of the debtor at the moment of the assignment.

Such creditors are, therefore, precluded from bringing the Revocatory action against the said debtor and his vendee of some property not included in the assignment.

Liquidators of Hart & Hebert vs. A. H. Huguet et al., 362.

2. A vendor, who has agreed with the vendee that the latter would assume the payment of certain obligations as part of the price of sale, is not allowed to plead the nullity of those obligations in a petitory action brought by said vendee, in which he claims title to the property sold.

Harris Jaffa vs. M. O. Myers and husband, 406.

ESTOPPEL—Continued.

3. The sureties of the cashier of a bank who, in the very bond signed by them, recognized the legal existence of that corporation, are estopped from denying that the bank had such legal existence at the date of the bond.

Teutonia National Bank vs. J. M. Wagner et al.

4. Estoppel must be specially pleaded.

Heirs of Wood vs. Joseph Nicholls, 744.

5. Appellee cannot be estopped from denying the appealable character of a suit, because consent cannot vest this Court with jurisdiction.

J. W. Smith vs. Merchants' Insurance Co., 1071.

6. The school board of the Parish of Union could not in accepting the accounts of their treasurer, allow him certain charges in violation of law. Their action was *ultra vires* in that respect, and not susceptible of ratification. The settlement made and discharge granted by them, under such circumstances, is not conclusive and may be assailed and set aside, at the suit of their successors in office, under charges of error and fraud. And the ex-treasurer cannot set up the plea of estoppel, under the facts of the case.

School Board vs. J. E. Trimble, 1073.

7. A party is not estopped by its pleading when the averment was made without knowledge of the real fact underlying the controversy,—especially when that real fact was within the knowledge of the adverse party.

L. B. Watkins vs. J. D. Cawthorn, 1194.

8. The judicial averments of a married woman, in her suit against her husband, of the sums received by him from her father for her account, estop her from afterwards disputing such sums in a partition suit between her co-heirs.

V. H. Dickson and Husband vs. H. P. Dickson et al., 1370.

9. One contracting with a Corporation is thereafter estopped from denying its corporate existence, unless it is for causes that occurred since the contract.

E. Latiolais, Adam., vs. Citizens' Bank, 1444.

EVIDENCE.

1. City Ordinances, differently from Acts of the Legislature, must be proved, as they cannot be judicially taken notice of.

The issue between the parties being the constitutionality and legality of the City Ordinance imposing a license-tax upon Attorneys-at-law, and there being no evidence of the Ordinance in the Record, the Appeal must be dismissed.

City of New Orleans vs. C. D. Labatt, 197.

2. An endorser who does not specially deny his signature on a note,

EVIDENCE—Continued.

will be considered as having admitted it, under the rule of Article 2244, C. C.; and the Plaintiff is dispensed with the necessity of proving it on the trial of the case.

Union National Bank vs. Succession of Thomas B. Lee, 301.

3. Judicial records cannot be impeached or contradicted by verbal evidence. *Mrs. L. L. Mann vs. B. L. Mann*, 351.

4. The Congress of the United States had no power to enact rules of judicial proceedings and evidence for the trial of causes in the State courts, and, to that effect, to declare that no written instrument should be received in evidence unless it were stamped. The Decision in Pargoud vs Richardson, 30 An., 1286, affirmed.

Widow A. Holt et al. vs. Liquidators of Hart & Hebert, 673.

5. After introducing in evidence, without any qualification, the certificate of the medical examiner, Defendant should not be permitted to impeach its integrity or assail the correctness of its statements.

A strong *prima facie* case made out by Plaintiff, cannot be defeated by conflicting evidence.

Susan S. Maclin vs. New England Life Insurance Co., 801.

6. Oral evidence is inadmissible to prove the promise of a person to furnish his signature on negotiable paper to another party, when the purpose of the evidence is to show that such person is liable for the debts of said other party by virtue of the promise.

R. W. Rayne & Co. vs. Richard Terrell, 812.

7. A juror cannot be heard disclosing his own improper conduct and impeaching his own verdict.

J. A. Godfrey vs. T. and L. Soniat, 915.

8. After the State has closed its case and the accused declined to offer any evidence, the Court may, within its legal discretion, permit the State's Counsel to call and examine other witnesses.

State of Louisiana vs. Walter Rose, 932.

9. A private statute should be offered in evidence on the trial of a suit, and cannot be judicially noticed. Affirming Decision in 28 An. 415.

A written act, purporting to be a transfer of all the rights of an association, and signed by parties, who therein pretend to be the sole members of such association, will not enable the assignee to stand in judgment, in default of accompanying proof that the assignors were really members and sole members of the said association.

Workingmen's Bank vs. G. T. Converse et al., 963.

10. Oral evidence is admissible to show and correct an error in the description of real estate, contained in the act of sale of the property.

EVIDENCE—Continued.

The fact that the vendee afterwards claimed the property, under the erroneous description, from the vendor's estate, does not estop him from proving such error by verbal evidence.

M. Levy vs. Mrs. V. A. Ward, Adm., 1033

11. The rule of evidence in Louisiana, differently from that established by the Supreme Court of the United States, is that a witness, on the cross-examination, may be interrogated upon matters unconnected with those upon which he was examined in chief. Previous Decisions affirmed.

Simulation, from its nature, can, usually, be proved only by indirect and circumstantial evidence; and when facts are shown, which are sufficient to throw doubt upon the reality of the sale, the burden of proof is shifted to the parties who know the truth and can establish it by their testimony.

When, under such circumstances, they fail to furnish the evidence clearly within their power, all the presumptions of law are against them.

Such *prima facie* case of simulation, if the parties charged with it do not even attempt to rebut it by their own testimony, will be conclusive and sufficient to set aside the transaction complained of.

H. D. King, Adm., vs. William T. Atkins et al., 1057.

12. When Defendant could, by his own testimony, prove the existence of a certain fact, which is particularly to his own knowledge, and he fails to do it, the presumption is against him that the fact does not exist.

When both parties have announced that their evidence is closed, the court, in its discretion, may grant to either party the *privilege* of introducing further proof, but it is not a *legal right*, that can be claimed as such.

When an attempt is made to discredit a witness by showing that he made a contradictory statement on a previous occasion, it is not sacramental that the exact time of the alleged contradictory statement should be designated; it is enough that sufficient reference is made to the circumstances that attended the statement, and to the statement itself, so as to place the witness fully on his guard.

Testimony is admissible to prove the sworn statement of a deceased witness, made in a previous suit between the same parties, when said statement does not contradict the official acts of the deceased witness. *School Board vs. J. E. Trimble*, 1073.

13. Acts of baptism are public acts, which require no proof of their

EVIDENCE—Continued.

genuineness; and certified copies of them, made by their proper custodians, are admissible in evidence as well as the originals.

Succession of Mélasie Hébert, 1099.

14. When an attempt is made to discredit a witness by showing that he made a contradictory statament on a previous occasion, it is not sacramental that the exact time of the alleged contradictory statement should be designated; it is enough that sufficient reference be made to the circumstances that attended the statement, and to the statement itself, so as to place the witness fully on his guard. School Board vs. Trimble, *ante* page 1073.

State of Louisiana vs. Wade Hampton, 1252.

15. The rule established in article 326, C. P., debarring a defendant who has denied his signature, from every other defense, does not apply to a partner denying the firm's signature executed by another partner. Affirming 29 An., 546.

Mutual Nat. Bank vs. J. P. Richardson et al., 1312.

16. The rule of exclusion of the husband's testimony against his wife, C. C. 2281, applies only during the existence of the marriage. This question is settled by previous decisions.

Succession of Josephine Hale, wife of Ames, 1317.

17. The deposition of a witness taken at the inquest before the Coroner is admissible in evidence, in behalf of the accused, on the trial of the case, when the witness has died since the inquest.

State of Louisiana vs. John McNeil, 1332.

EXECUTORY PROCESS.

1. Defendant in executory process is not entitled to an injunction without bond under Article 739, C. P., on the ground that the obligation sued upon was null and without consideration *ab initio*.

On the trial of the suit, in which an injunction was issued without bond, no evidence is admissible in support of allegations other than those containing any of the reasons for the injunction as are enumerated in Article 739, C. P.

Damages cannot be allowed in the same judgment which dissolves an injunction in a case of executory process. Affirming Decision in Testard vs. Belot, 33 An., (not reported), which re-affirmed 31 An., 729, and 32 An., 932 and 1296.

W. J. Hodgson vs. Mrs. Ella Roth and husband, 941.

2. If the mortgage creditor is entitled to executory process against his mortgagor, he has the same right against the vendee of the latter, even if his act of mortgage does not contain the pact *de non alienando*, but, in that case, he must proceed, as against third possessors,

EXECUTORY PROCESS—Continued.

by the hypothecary action proper, after the thirty days demand and ten days notice provided for by the Code of Practice. And the fact that such mortgage creditor has obtained judgment against the original mortgagor, does not deprive him of the right of executory process, in the hypothecary action, against the mortgagor's vendee

M. A. Montego vs. Gordy, Sheriff, et al., 1113.

3. The Citizens' Bank may proceed by seizure and sale to collect the contributions due by a stockholder. Affirming 25 An. 628.

E. Latiolais, Adm., vs. Citizens' Bank, 1444.

HOMESTEAD.

1. Parties claiming the benefit of the Homestead law, must disclose and establish a clear case within its purview.

Widow Caroline Tilton vs. Joseph Vignes et al., 240.

2. Sect. 1691, Rev. Sta., which provides for a homestead in favor of the debtor having a family or mother, or father or persons "dependent on him for support," means persons dependent for *actual* and *necessary* support, and not persons able to earn a living. A debtor supporting persons of the latter class, is not entitled to the exemption of the homestead.

Widow Lenfroy Decuir vs. Benker, Sheriff, et al., 320.

HUSBAND AND WIFE.

1. It is not incompatible with the wife's personal and sole administration of her paraphernal property, that she would employ her own husband as her agent for the purpose of that administration.

When the paraphernal property is thus administered by the husband, as agent of his wife, by virtue of a special and express power of attorney, and his administration is clearly and positively in her name, for her own account, and subject to her control and authority, the fruits of the property belong to her and not to the community.

[Note of the Reporter]: The property in this case was a plantation situated in the State of Mississippi.

The wife has the right to buy property for her separate account, partly for cash and partly on credit, when she pays the cash portion of the price with her paraphernal funds, and has revenues derived from her paraphernal property, sufficient to pay the credit portions of the price when they become due.

The property thus bought by her is paraphernal.

General principles laid down by the Court to show when and how the wife may buy property for her separate account, on credit.

Mrs. Mary E. Miller, wife of W. L. Jackson, vs. Handy, Sheriff et als., 160.

HUSBAND AND WIFE—Continued.

2. The wife has no mortgage on the property of the husband to secure a donation *propter nuptias* made to her by himself. Re-affirming the Decision of Gates vs. Legendre, 10 Rob. 74.

Vincent T. Cambre, etc. vs. Félicité Grabert et al., 246.

3. A creditor of the husband, holding a mortgage on property transferred by the latter to his wife in payment of her paraphernal rights, has no reason to contest the legality of the transfer, inasmuch as the property is transferred subject to the mortgage of the creditor, towards whom the wife is then in the position of a third possessor.

There is no legal objection to the husband's transferring to his wife, in payment of her paraphernal rights, property encumbered with a mortgage, because the wife takes the property subject to the mortgage, without assuming the debt of her husband.

The insolvency of the husband is no legal obstacle to the transfer made by him to his wife in satisfaction of her paraphernal claims, and, in that respect, such transfer is not subject to the rules which govern the revocatory action. There is no difference to be made whether the transfer takes place after judgment of separation, or without such judgment. Previous decisions affirmed.

Mary E. Levy, executrix, vs. Daniel Morgan et al., 532.

4. It is settled that the recompense due by the separate estate of the wife for improvements placed thereon, during marriage, at the expense of the community, is the enhanced value resulting to her separate estate from the improvements, at the date of the dissolution of the community. If the improvements be added by the husband out of his separate funds, under the same circumstances the recompense due him by the separate estate of the wife must be settled by the same rule, as there is no difference in principle between the two cases.

It is a perfectly equitable mode of fixing that enhanced value, to make an average of the valuations placed by all the witnesses on the land and improvements together and on the same separately.

Succession of Mrs. Ella Roth, 540.

5. When the wife, in a suit against her husband for a separation of property, asserts that certain property, acquired in her name, during the existence of the community, was bought with paraphernal funds and is her separate property, the presumption of law is against her and she must rebut it by legal evidence to establish her title.

The declarations of her husband and of herself in notarial acts, that he received various sums of money for her, and that the purchases

HUSBAND AND WIFE—Continued.

made in her name were paid for with her own funds, are no legal evidence of such facts, so far as third persons are concerned.

Louise A. De Sentmanat, wife, etc., vs. Nelvil Soulé, 609.

6. A judgment of separation of property and dissolution of the Community, rendered after citation to the husband, duly published and followed by an execution, and subsequently and uniformly recognized by both parties thereto, in many acts and proceedings, cannot be set aside at the suit of the heirs of the husband, upon uncertain and verbal evidence. *Heirs of Compton vs. F. L. Maxwell*, 685.

7. The husband may make a transfer of his property to his wife, in payment of her legal claim against him, whether she has a mortgage or not; and his insolvency is no obstacle to such settlement, as the law contemplates his very financial embarrassment as the reason of the transfer, which is, therefore, not subject to the rules of the Revocatory action. Decision in Levi, Executrix, vs. Morgan *et al.*, 33 An. 932, affirmed.

The right that the wife had against her husband for such transfer, her heirs have after her death, and the *dation en paiement* of transfer can equally be made to them; but the debt which it it proposed to satisfy, must be a real one, properly evidenced. Therefore, the *dation en paiement* made by the father to his children in payment of their rights, as heirs of their mother, in the Community, will be set aside in favor of creditors of that Community, if the same has not been liquidated. *M. U. Payne vs. P. H. Kemp et als.*, 818.

8. In default of proof of the husband's financial embarrassment, the wife, suing for a separation of property and recovery of paraphernal rights, should be nonsuited.

Eliza P. Hendricks, wife, vs. T. Wood, husband, 1051.

9. The wife having obtained a judgment of separation of bed and board against the husband and a decree ordering the sale of the Community property for the purpose of a partition of the proceeds between them,—and the husband having enjoined the execution of the decree and failed in his injunction suit; *quœre:* can the wife, *in the partition of said proceeds*, claim rent of the Community property enjoyed by the husband during the injunction, and her Counsel fees? *Held*, that she cannot and must prefer such claim on the injunction bond. *Barbara Beopple vs. B. P. Green*, 1191.

10. A *dation en paiement*, made by a partner to his own wife, of the property of the firm, in satisfaction of her claim against the firm for her paraphernal funds held by it, is legal and valid.

J. Murrell et al. vs. Mary E. Murrell et al., 1233.

HUSBAND AND WIFE—Continued.

11. The husband cannot claim from the estate of his deceased wife, payment of a contract formed between her and him during marriage. *Succession of Josephine Hale, wife of Ames*, 1317.

12. The husband is not entitled against his deceased wife's estate to remuneration for services rendered to her during marriage. *Ibid.*

13. A disguised donation from the wife to the husband, is not reducible to the disposable portion, but is absolutely null and void. *Ibid.*

INJUNCTION.

1. A party who bases his right to an Injunction on Article 303, C. P. must show: either that he has a *right of property* in the thing, or the act sought to be enjoined, would, if done, give him a right to damages. *Michael J. McAdam vs. John S. Rainey et al.*, 108.

2. The order of court dissolving an injunction on bond, may work an irreparable injury and is appealable, when the act enjoined, as alleged, amounts to a trespass, and the effect of dissolving the injunction would be to change the possession of immovable property. Affirming previous decisions.
State of Louisiana ex rel. Edward Sigur vs. Judge, etc., 133.

3. An Injunction does not lie to restrain a municipal Corporation from passing an Ordinance. The Petition of Plaintiff applying for the Injunction discloses no cause of action.
Wm. C. Harrison et al. vs. City of New Orleans et al., 222.

4. In a suit by injunction, there being a reconventional demand by the defendant, and the merits of the case being properly put to issue by the pleadings, the defendant, in obtaining the dissolution of the injunction, on the trial in the absence of the plaintiff, is entitled, not merely to a judgment of nonsuit, but to one that should be conclusive between the parties, and if not appealed from, should constitute *res judicata*.
It is only in suits by injunction restraining the execution of a money judgment, that the defendant can obtain in the same decree the dissolution of the injunction and damages.
The prayer for general relief would in no case warrant a judgment for damages against the surety on the bond, when none are asked against him. *Pierre Verges vs. Gonzales, Sheriff, et al.* 410.

5. When the writ of injunction was not clearly abused, the defendant, on its dissolution, is only entitled to counsel fees in the way of damages. *Heirs of Stafford vs. Henry Renshaw*, 443.

6. Pending a suspensive appeal from an order dissolving an injunction on bond, the injunction itself remains in full force and its restraining effect should not be, in any manner, impaired by any subsequent action of the lower Court.

INJUNCTION—Continued.

A counter-injunction in the meantime should, therefore, not be granted and is an invasion of the appellate jurisdiction of this Court, and, in the premises, an indirect disobedience of its mandate ordering the original injunction to be re-instated.

A Mandamus lies to compel the lower Court to grant a suspensive appeal from its order dissolving on bond another injunction taken by the original plaintiffs in injunction and other parties, for the same restraining purposes.

And a Prohibition lies to prevent said lower Court from permitting the execution of the order to bond and from violating in other manners the original injunction, during the suspensivs appeal from the order dissolving the same on bond. 32 An., 1192.

The State ex rel. Gravois et al. vs. Judge, etc., 760.

7. The sworn allegation of Plaintiff in injunction, that the act to be enjoined will cause irreparable injury, is not conclusive of the fact and and does not deprive the judge who granted the injunction, of all discretion in dissolving it on bond.

Crescent City Live Stock Co. vs. Butchers' Union, etc., 930.

8. A party against whom executory process has issued, cannot enjoin it, on the ground that the property seized does not belong to him.

Union Bethel Church, etc., vs. Civil Sheriff et al., 1461.

9. Damages cannot be allowed in the same decree which dissolves an injunction in cases of executory process. Previous Decisions affirmed.

INSURANCE.

1. The failure of the insured, to make certain returns of all produce consigned to them and to pay premiums thereon, as stipulated by the underwriter, vitiated and avoided their contract of insurance in the premises.

There was no waiver of the right of forfeiture, on the part of the insurer under the circumstances of the case.

E. C. Palmer & Co. vs. Factors' and Traders' Insurance Co., 1336.

INTERVENTION.

1. An Intervenor, not having prayed for citation against Plaintiff, is no party to the latter's suit and cannot offer evidence on the trial of the case.

Chism & Boyd vs. Thomas Ong et al., Chubbuck, Intervenor, 702.

INTRUSION INTO OFFICE LAW.

1. In a proceeding under the Intrusion into Office law, at the instance and on the relation of a private individual, the first inquiry is: Has the Relator a *muniment of title* to the office held by the Defendant?

INTRUSION INTO OFFICE LAW—Continued.

If he has not, and only contests the rights of the Defendant, without exhibiting an apparent title in himself, the proceeding must fall.

The object of that law, which provides for a summary proceeding to test the superiority of the respective titles of the Relator and the Defendant, to an office, was not to embrace cases in which no *prima facie* title, such as a commission, a judgment, or a return of election, can be produced by office claimants.

The law in question was not intended as a substitute for the law providing for and regulating the contestation of elections, and has not repealed the same.

The State ex rel. J. T. Ford vs. Ernest Miltenberger, 263.

2. The Intrusion into Office Act is yet in force, and unrepealed or unaffected by any provision in the Constitution of 1879.

In proceedings under that Act, the failure of the State to appeal does not prevent any other party in interest from doing it.

Whilst this Court will not compel the Attorney General by Mandamus to take and bring up an appeal in the name of the State, still that officer cannot bind the State by acquiescence in a judgment adverse to her. A mere allegation of acquiescence, contained in a motion to dismiss, unsupported by affidavit, does not justify the remanding of a cause for the purpose of having the question as to acquiescence tried in the lower court.

The State ex rel. Howell, District Attorney, etc., vs. Echeveria, Sheriff, et al., 709.

JOINT PROPRIETORS.

1. An agreement between Plaintiffs and Defendant, entered into in December, 1873, by which the latter was to pay the former, as part of a certain compromise between them, the sum of $600, as their half of the rents for the year 1873 of a plantation belonging jointly to the parties, does not constitute a lease and cannot be the basis of the tacit reconduction for subsequent years.

The joint proprietor of a plantation who cultivates half of it for his own account, without preventing his co-proprietor from occupying and cultivating the other half, is not liable to the latter for rent of the common property. Affirming decision in Becnel vs. Becnel, 23 An., 150.

Heirs of J. D. and H. B. Balfour vs. L. G. Balfour, 297.

JUDGE *DE FACTO*.

1. A prisoner arrested by virtue of the *mittimus* of a committing magistrate, cannot, in an application for a *habeas corpus*, raise the question of the legality of said magistrate's title to office, when the latter is the regular incumbent *de facto*, acting and presiding over a tribunal of recognized legal existence and competency.

The State ex rel. H. Williams vs. Constable, etc., 1411.

JUDGMENT.

1. Interest cannot be collected on a judgment for money, which, by its terms, is silent as to interest.

A judgment is not a debt within the meaning of Article 1938, C. C.

Succession of Robert Anderson, 581.

2. A money judgment, rendered by a court of original jurisdiction in a sister State, against one who was at the time the Executor of the debtor in that and in this State, said judgment being subsequently affirmed by the Supreme Court of that State contradictorily with an Administrator *de bonis non*, appointed to represent the estate,—can be made the cause of an action in this State.

Such judgment, in the suit brought upon it in this State, is not conclusive of what it decrees and, on the contrary, it is open to all the defenses which can be legally opposed to judgments, but it is a sufficient legal cause to institute an action upon.

T. W. Turley vs. Dreyfus, Executor, 885.

3. A judgment simply dismissing the demand of an intervenor, on the ground that he was not present or represented at the trial of the cause, cannot support the plea of *res judicata*.

The terms of the judgment itself should govern, and not the statement of the judge made in relation to it in some other proceeding, that there was a clerical error in said terms.

C. T. Bourg vs. C. H. Gerding et al., 1369.

JUDICIAL SALES.

1. Unless the sheriff, in offering property for sale at public auction, announces, after reading the mortgage certificate, that the purchaser shall have the right to retain the amount of the anterior mortgages and priviliges, there can be no valid adjudication.

But the nullity is susceptible of ratification.

Southern Mut. Insurance Co. vs. Mrs. Mary A. Pike et al., 823.

LAND OFFICE.

1. Certificates of purchase from the Land-Office, made in accordance with law, operate an equitable severance of the land from the public domain and constitute sufficient evidence of title, when accompanied with possession, to form the basis of the prescription of ten years, against the holder of a patent issued subsequently to the acquisition of said prescription.

Edward J. Gay vs. Thos. H. Ellis, 249.

LAWS.

1. The same rules of construction apply to State Constitutions and to the Acts of the Legislature.

In order that a statute should be retroactive, the intention of the law-

LAWS—Continued.

giver in that respect must have been expressed in clear and unambiguous terms.

City of New Orleans vs. Julien Vergnole, 35.

2. Under the Constitution of 1868, several objects might be contemplated in a statute, but each object must have been expressed in its title.

Laws in derogation of common right must be strictly construed and not extended beyond their precise terms.

Of this character are those laws which are designed to substitute a summary mode of procedure to the ordinary rules of practice.

Constitutions are to be interpreted in the same manner and according to the same rules as Statutes.

Succession of Patrick Irwin, 63.

3. A Statute is not unconstitutional as a whole, under the Constitution of 1868, because all its objects are not expressed in its title. Those parts of the law, which are indicated by the title, must stand, while only those not so indicated will fall, unless they are so interwoven with, and dependent upon, each other, that they cannot be separated.

State of Louisiana vs. John P. Exnicios, 253.

4. It is beyond the province of this Court, in construing Articles 575 and 624, C. P., (formerly Act of 1843), to strike out of the statute the word "an" and insert in lieu thereof the word "no" without positive proof of the error, furnished by the original enrolled bill.

Louise A. De Sentmanat, wife, etc., vs. Nelvil Soulé, 609.

5. Section 3784 of the Revised Statutes, which provides for the punishment of the State Treasurer by fine, etc., for refusing to pay warrants in certain cases, upon *conviction* thereof, etc., means a conviction under a regular criminal proceeding. Such conviction is a condition precedent, under the Statute, to the recovery of the penalty.

A. L. Tissot vs. A. Dubuclet et al., 703.

6. A law may be broader than its title and not be unconstitutional. Such portions of the law as are not expressed in the title, are null and void, and the rest is valid.

State of Louisiana vs. John Crowley et als., 782.

7. Act No. 39 of 1873, is not unconstitutional on the the score of its title.

W. H. McGregor vs. R. W. Allen, 870.

8. Act No. 121 of 1880, Sec. 6, providing that " * * * no bond shall be stamped until the said January coupon shall have been surrendered to the Treasurer or Agent," is violative of the Constitutional Ordi

LAWS—Continued.

nance, in imposing additional requirements for the stamping of the bonds, and, to that extent, it is inoperative.

The State ex rel. Ecuyer vs. E. A. Burke, Treasurer, 969.

9. The laws of other States can have no extra-territorial effect in this.

Life Association of America vs. S. Levy, 1203.

LESSOR AND LESSEE.

1. Plaintiff, as lessee of a lot of ground, and Defendant as lessor of the same, agreed that the latter, at the expiration of the lease, would pay the former for buildings and improvements constructed by him on said lot of ground, a price to be determined by "two disinterested persons, one to be chosen by each, etc."

Held that such an agreement is the law of the case between the parties, and, in the absence of a charge of fraud against the so constituted experts, this Court will not disturb their finding.

Hermann Graf vs. Samuel Friedlander, 188.

2. The tenant of a predial estate cannot claim an abatement of the rent, under Article 2743, C. C., on account of an overflow of the Mississippi River. Such an event is not one of the accidents of extraordinary nature that could not have been foreseen by the parties. Decision in 16 An., 162, affirmed.

Mrs. M. J. Jackson, Adm. vs. W. C. Michie et al., 723.

3. An unrecorded act of lease of real estate produces no legal effect as to third persons.

The lessee of immovable property, under an unrecorded lease, is liable to the seizing creditor for rent accruing after seizure, though he has paid it to the lessor by anticipation, or furnished negotiable notes for it.

The lessee of immovable property, under an unrecorded lease, in case of seizure, has the right to claim the dissolution of the lease; but, if he remains in possession, a tacit reconduction results from it in favor of the seizing creditor.

Decision in 30th An., 436, affirmed.

W. F. Anderson vs. C. Comeau, 1119.

4. The lessee must suffer necessary repairs to be made during the existence of the lease and is not justified in abandoning the premises on that score. *G. M. Murrell vs. Jackson & Manson*, 1341.

5. A lease of property granted by the usufructuary expires when the usufruct ceases, whether such termination is caused by the death of the usufructuary, or by a judgment of court decreeing the loss of the usufruct for abuse.

V. H. Dickson and husband vs. H. P. Dickson et als., 1370.

LESSOR AND LESSEE—Continued.

6. The failure of the lessor to make necessary repairs, does not afford the lessee a legal reason for not paying the rent, or sustain a claim for the damage suffered by his furniture from the bad condition of the leased premises,—when the rent is sufficient to enable the said lessee to make the repairs himself. Previous Decisions affirmed.

This principle is equally applicable when the lessee has furnished rent notes, if they are still in the hands of the lessor.

Mrs. B. Lewis et als. vs. Widow J. F. Pepin, tutrix, 1417.

LICENSE TAX.

1. Foreign insurance companies taking risks through insurance agencies or insurance brokers in the City of New Orleans and issuing policies from their own domicils, are not subjected to the Ordinance of the City of New Orleans, which imposes a license tax of five hundred dollars on insurance companies incorporated in another or a foreign State and doing insurance business in said City by an agent. Decision in 31st An. 781, affirmed.

City of New Orleans vs. Foreign Insurance Companies, 10.

2. Article 206 of the Constitution, providing that "No political corporation shall impose a greater license tax than is imposed by the General Assembly for State purposes," was not intended to act retroactively.

The Constitution took effect from and after the first day of January 1880.

Article 206 does not, therefore, affect the legality of the License ordinance of the City of New Orleans, No. 6253, passed on the 23rd of December, 1879, under the laws then in force, and imposing certain municipal license taxes.

City of New Orleans vs. Julien Vergnole, 35.

3. No municipal Corporation in the State can impose a greater License for the sale of alcoholic or spirituous liquors than is imposed by the General Assembly, on the ground that it is a police regulation. Article 170 of the Constitution in no manner controls, or even relates to, Article 206.

The State ex rel. Daniel Lemle, vs. Chase, Tax Collector et al., 287.

4. The license tax imposed by the City of New Orleans on keepers of private markets, does not violate the Constitutional rule of equality and uniformity in taxation, though no license tax at all is imposed upon the sellers of meat, vegetables and other articles, in the public markets of the City.

City of New Orleans vs. John Dubarry, 481.

5. Article 206 of the Constitution does not affect the legality of the License ordinance of the City of New Orleans, No. 6253, passed on

LICENSE TAX—Continued.

the 23rd of December 1879, under the laws then in force, and imposing certain municipal license taxes. Decision in City of New Orleans vs. Vergnole, 33 An. 35, affirmed.

The Administrator of Finance of the City of New Orleans has no authority to reduce in some particular cases the amount of the license tax fixed by the city ordinance.

City of New Orleans vs. C. Meister, 646.

6. The Ordinance of the City of New Orleans, imposing a license tax upon the owners of towboats running on the Mississippi river to and from the Gulf of Mexico, does not impose a duty upon tonnage; nor is it a regulation of commerce. Such Ordinance is not, therefore, in conflict with the provisions of the Constitution of the United States on these points. The authorities on the subject are reviewed at length in the Decision.

Nor is the same Ordinance obnoxious to the restrictions of the State Constitution of 1879. Decision in City vs. Vergnole, 33 An. 35, reaffirmed.

City of New Orleans vs. Eclipse Tow-Boat Company, 647.

LIFE INSURANCE.

1. A policy of insurance taken on the life of the husband in favor of the wife, vests the latter with a right, which the former cannot destroy or control without her consent.

Such a policy belongs to the wife exclusively, and not to the Community of acquets and gains. Previous Decisions affirmed.

Therefore, the insurer, having at the request of the husband and without the consent and knowledge of the wife, substituted to such a policy, one in favor of the husband, will remain liable to the wife on the original policy for the amount thereof, less the sums of premiums paid on the substituted policy.

And the insurer will also be liable to the transferree of the substituted policy, because he is estopped from denying its legal and independent existence, having been instrumental in inducing innocent third persons to give value for it, by issuing it and representing it to the world as an original policy in favor of the husband, and consenting to its transfer.

Mrs. A. M. Pilcher vs. New York Life Insurance Co., 322.

2. A policy of life insurance will be annulled when the insured made misrepresentations to the insurer as to his habits of intemperance, although he may himself, in making the declaration, have been in good faith and not have intended to commit a deception.

Hartwell, Agent, etc., vs. Alabama Gold Life Insurance Co., 1353.

LITIGIOUS RIGHTS.

1. The sale of Plaintiffs' interest in the land sued for in a petitory action, for a fixed price and without warranty, is the sale of litigious rights, and the vendee being the sheriff of the court in which the suit is pending, such sale is null and void. The fact that the suit is still carried on, after the transaction, in the name of the original Plaintiffs, does not prevent the nullity.

C. C. Duson, Curator, vs. L. Dupre et al., 1131.

MANDAMUS.

1. The Petition for a Mandamus must be sworn to, as required by Art. 840, C. P., and the omission of the Petitioner's oath cannot be subsequently cured by means of a supplemental Petition.

State of Louisiana ex rel. Fisk vs. Police Jury, etc., 29.

2. The duty of the Treasurer to stamp the bonds, as required by the Ordinance of the Constitutional Convention of 1879, is purely ministerial, and he should be compelled by Mandamus to perform it.

The State ex rel. Ecuyer vs. E. A. Burke, Treasurer, 969.

3. The petition for a Mandamus needs not be in the name of the State. It is only the Writ that must be issued in the name of the State. And the prayer of such Petition being for an *Order commanding*, etc., is equivalent to a prayer for a *Mandamus*. The word is not sacramental.

The State ex rel. Dardenne, President, etc., vs. Judge, etc, 1356.

MANDATE.

1. A special power of attorney to prosecute a claim, does not empower the agent to defend and stand in judgment in a suit brought by the debtor for damages for slander and libel.

A. L. Gusman et al. vs. L. DePort et al., 333.

2. A general insurance agent, with authority to solicit and receive applications for insurance, has no power to accept such applications and bind his principal by stating to the applicant that the risk attached at a certain moment.

G. W. Stockton vs. Firemen's Insurance Co., 577.

MARRIED WOMEN.

1. A married woman may legally bind her paraphernal property for the purpose of liberating her husband from jail, and when she has done so in contracting with third persons in good faith, she is not allowed to deny her obligation on the ground of the marital influence and coercion.

Such a defense is a fraud, for the perpetration of which the law will not lend her the aid and relief which it extends to married women against the abuse of the marital power.

Harris Jaffa vs. M. O. Myers and Husband, 406.

MARRIED WOMEN—Continued.

2. A married woman, who has bound herself, with the marital authorization, towards an innocent third person, as surety of a party between whom and her husband there exists a secret partnership, cannot plead that she has, by her contract of suretyship, assumed to pay her husband's debt, and thereby exonerate herself from her obligation. To sustain such a defense, would be to convert the laws intended for the protection of married women, into a system of legalized deception and fraud.

Bank of Lafayette vs. Mrs. E. J. Bruff, 624.

3. The wife may, after the death of the husband, ratify the act by which she had bound herself for his debt, during his lifetime.

The nullity of such an act is only absolute in this sense, that she cannot ratify it as long as she is under the marital influence.

When the wife has ratified such an act after the death of the husband, the ratification is retroactive, and renders the act valid from its original date.

Therefore, creditors who only became so subsequently to its date, cannot attack the validity of the ratified act.

Charles Lafitte et al. vs. Widow E. R. Delogny et al., 659.

4. The administrator of a married woman's succession has the right to show, without pleading fraud and injury, that an obligation contracted by her during her lifetime and upon which her estate is sued, was for the purpose of paying her husband's debt, and, therefore, null and void.

John Chaffe, Bro. & Son vs. Oliver, Adm., 1008.

5. A married woman, separated in property and administering her own affairs, is liable on her note, without proof that it enured to her individual benefit.

Julie Cormier, Adm., vs. T. DeValcourt, Adm., 1168.

MINORS.

1. The Court of ordinary jurisdiction has the power to entertain to final consummation the executory proceedings against a minor's property. Soye vs. Price, 30 An., 93, reaffirmed.

An inventory of the minor's property, as a pre-requisite to a partition, is not indispensable when there is only one piece of property to be partitioned.

Property held in common with a minor and sold under a judgment in a partition suit, may be sold regardless of appraisement.

When property, in which the natural tutor has an undivided share, is sold to effect a partition, there is no law of the State which authorizes the referring of the legal mortgage of the minor to the proceeds of the sale. The mortgage shall remain attached to the undivided portion of the property which belonged to

MINORS—Continued.

the tutor, until the removal of it by means of the special mortgage provided for by law, or the extinction of it by settlement of the minor's rights at his majority. The purchaser, in the meantime, takes the property subject to the minor's mortgage, and retains in his hands the price of the tutor's share.

Lecarpentier vs. Lecarpentier, 5 An., 497, affirmed.

Life Association of America vs. G. L. Hall, 49.

2. The process-verbal of the family meeting advising the purchase of of real estate for a minor, is not a sufficient warrant for the tutor, if not homologated by the Court, and the purchase, in that case, does not bind the minor.

The subsequent approval and homologation of the tutor's account, in which the purchase is charged to the minor, cannot validate the act of the tutor done without legal authority.

The taking of possession by the minor at his majority, of the property thus purchased, is no ratification of the act of the tutor, unless an account of the tutorship with the vouchers, as required by law, has been previously rendered to him.

The minor, emancipated by marriage, has only a power of administration over her property.

When a tutor has been also administrator over the succession of his ward's parent, he cannot in rendering his account of tutorship, engraft upon it the homologated account of his administration of the succession. The latter is not binding upon the minor.

Succession of Antoine Mitchell, 353.

3. The special mortgage furnished by the natural tutrix in favor of her minor children, does not destroy, but merely restricts the previous legal mortgage.

H. M. Isaacson vs. P. H. Mentz, et al., 595.

4. Minors, whose property was sold without legal authority, can recover it without tendering the price of sale to the purchaser.

They are not estopped from revendicating the property because, in the partition of their father's succession, at their majority, they received the proceeds of such sale, when they were not informed of the fact connected therewith. Their action, under such circumstances, cannot be considered as a ratification of the sale.

They have ten years after their majority, during which they are in time to revendicate the property.

The purchaser of the property sold in such case is not entitled to an offer of restitution of the price, as a condition precedent of the revendication, but he may claim the amount in reconvention.

The law does not consider the fact that a purchaser did not examine

MINORS—Continued.

into the titles by which his vendór acquired the property as an evidence of bad faith.

The purchaser may be one in good faith, though his vendor acquired the property in bad faith.

Heirs of Self vs. B. F. Taylor, 769.

5. The rule, in computing certain legal delays, that neither the day of notice nor that on which the act is to be done are included, does not apply to Article 361, C. C., which provides that agreements between tutors and their wards arrived at the age of majority are null, unless preceded by a full account and vouchers rendered ten days previous to the agreement.

W. J. Hodgson vs. Mrs. Ella Roth and husband, 941.

6. Sale of minors' property by order of Probate Conrt on advice of family meeting.

R. C. Wisenor vs. R. H. Lindsay, 1211.

7. The rule that a tutor can act as administrator of his ward's parents' estate as long as creditors do not object, is re-affirmed in this instance.

Under the circumstances of the case, the action of the tutor, in the Motion to revive, is maintained pending the application for the appointment of the administratrix.

The State ex rel. Jones vs. City of Shreveport, 1247.

MORTGAGE.

1. A mortgage is not negotiable like the note it is intended to secure, but on the contrary, passes into the hands on the transferree subject to all the equities and defenses which existed between the original mortgageor and mortgagee.

Pierce Butler vs. Mrs. Cora A. Slocomb, 170.

2. A. B. and C. are owners undividedly of lots of ground 1, 2 and 3.

D. has a mortgage with the pact *De non alienando* on the one undivided third interest of C. in the three lots.

A. B. and C. partition the three lots among themselves, and lot 3 is assigned to C.

C. puts a mortgage upon said lot 3 of which he has become sole owner. E., the holder of this mortgage, forecloses it and buys in said lot 3 at sheriff's sale.

D. takes a judgment against C., seizes and sell his one undivided third interest in the three lots and buys it in, ignoring the previous adjudication to E.

D. then brings a partition suit against A. and B. averring their respective one undivided one-third interest in the three lots; and he, in the same suit, has E. cited, and prays for judgment against him decreeing he has no title to lot 3.

MORTGAGE—Continued.

In answer to the partition suit, A. and B. admit the title of D., as alleged by him.

Held: that the pact *De non alienando* availed D. in executing his judgment against C., as well as if he had proceeded to foreclose his mortgage by executory process; that D. had the right to cite E., in the partition suit, to defend the title he lay to lot 3; that *quoad* E., the suit is petitory and he must establish his title; that *quoad* A. and B. the suit is for a partition and their title is averred by the plaintiff and needs not be established; that the original extrajudicial partition between A. B. and C. did not affect the mortgages upon their respective undivided interests; that when C. gave a mortgage to E. upon lot 3, it only affected his one undivided third interest in said lot, and when E. foreclosed his mortgage and bought in, he only acquired that one undivided third interest, and only got a title defeasible by the pact *De non alienando* of D.: that E. therefore, has no title to lot 3.

Neuville Bienvenu vs. Factors' and Traders' Insurance Co., 213.

3. A mortgage upon a plantation attaches to the *batture*, which is formed in front of the said plantation subsequently to the act of mortgage.

The seizure and sale of the plantation, at the suit of the mortgage creditor, carries with it the seizure and sale of the *batture*, as part of the property mortgaged, seized and sold, and the said *batture* passes with the plantation to the purchaser.

Wm. W. Hollingsworth vs. John & Charles Chaffe, 547.

4. The owner of concurrent mortgage notes, who has assigned some of them for value, has no right to compete with his transferree in the proceeds of the mortgaged property, if they are not sufficient to satisfy the claims of both. This is well established in our jurisprudence.

The fact that, in endorsing and transferring the notes, he stipulated he was not liable for the same, makes no exception to the rule.

The principle is equally binding upon him, if he made a gratuitous donation of the notes to a person, who afterwards assigned them for value.

Abney & Co. vs. Wm. E. Walmsley, 589.

5. The stipulation in an act of sale, that the amount paid by the vendor to insure the property sold, in case the purchaser neglects to do it, shall be secured by privilege on the property, has no legal effect whatever, as privileges can only be created by law and not by the agreement of parties.

MORTGAGE—Continued.

And the stipulation in the same act of sale, that said premiums of insurance shall be secured by mortgage upon the property, is equally of no avail to the vendor, if the amount and rate of insurance are not fixed in the act. The mortgage in such case is not for an *exact* sum, as required by law, and is, therefore, invalid.

The pact *De non alienando* in an act of mortgage does not prevent a subsequent purchaser of the property mortgaged, from contesting the very validity of the mortgage itself. Such purchaser has acquired the property subject to the pact, provided the mortgage is real and valid; but if it is not, the pact is itself of no effect.

State of Louisiana vs. Citizens' Bank, 705.

6. A mortgage creditor with the pact *De non alienando* may disregard the seizure of the mortgaged property made by a junior mortgagee and proceed by seizure and sale in another court.

The mortgage creditor with the pact *De non alienando* may ignore subsequent transfers of the property and proceed *via executiva* against the original mortgagor; but, if he choose to sue such subsequent vendees, instead of the original mortgagor, he must proceed, as against third possessors, by the hypothecary action proper, and not *via executiva*.

Michael Troendle vs. O. De Bouchel, 753.

7. Mortgage creditors, ruled into court to show cause why their mortgages should not be erased, on the ground that the mortgaged property was judicially sold to effect a partition,—have the right to show and urge the nullity of the sale.

J. Borde vs. Widow Erskine et al., 873.

8. The title by which the holder of a mortgage note sought to acquire the mertgaged property, being annulled, confusion and extinguishment cease and the mortgage still exists.

W. B. Spencer vs. Goodman & Bradfield et al., 898.

9. A subsequent mortgagee has no interest in the question whether an antecedent mortgage was or not properly re-inscribed, when the property upon which said antecedent mortgage rested, was sold and the purchaser assumed the mortgage as part of the price of sale, and the act of sale was recorded before the alleged peremption of the said antecedent mortgage. The holder of such vendor's privilege will necessarily outrank the subsequent mortgagee, whether the said assumed mortgage is or is not perempted.

Plaintiff's demand comes within the purview of the Revocatory action, to which, under the facts of the case, the prescription of one year applies.

Mr. and Mrs. Cante vs. L. B. Cain et al., 965.

MORTGAGE—Continued.

10. A mortgage, which has not been recorded, ceases to have any effect after ten years, *even between the parties to the contract.* C. C. 3369

Charles Tilden, President, &c., vs. Succession of C. H. Morrison, 1067.

11. It was contended in this case that the mortgage granted by the Defendant on her right, title and interest in certain property, was null and void, because she was a widow in community and the property an asset of an unliquidated community, in which she had only a residuary interest, which was not mortgageable. *Held* by the Court, without in any manner deciding whether such an interest is or not mortgageable, that, in the premises, the mortgagor appeared in the act of mortgage as any ordinary individual, not as widow in community; that she mortgaged such interest in the property as she might have, not her interest as widow in community, and that, therefore, the objection to the validity of the mortgage is not tenable.

M. L. Dickson vs. H. P. Dickson, 1244.

12. The interest of the widow in community is residuary and can only be ascertained and defined after a settlement of the community. It follows, therefore, that mortgages granted by her before the liquidation of the community, cannot affect her obligation, upon the extinguishment of her usufruct, to account to her co-proprietors, and cannot prejudice the rights of the latter upon the entire mass of the community.

V. H. Dickson and husband vs. H. P. Dickson et als., 1370.

13. A mortgage granted by a stockholder of the Citizens' Bank, to secure the amount borrowed by him, needs not be re-inscribed.

E. Latiolais, Adm. vs. Citizens' Bank, 1444.

MUNICIPAL BONDS.

1. The Supreme Court of the United States, in the recent case of Meriweather, Receiver of Memphis, vs. Garrett *et al.*, has not reversed or modified the principles previously recognized in repeated Decisions, that where a statute authorized a municipal corporation to issue bonds and to exercise the power of taxation to pay them, and persons bought said bonds, this power of taxation is part of the contract, and cannot be withdrawn until the bonds are paid. This Decision in the Memphis case closely examined.

B. Saloy et al. vs. City of New Orleans, 79.

2. Municipal bonds issued in pursuance of legislative authority and negotiable in form, are not subject to equities as to consideration or otherwise, in the hands of a *bona fide* holder for value before maturity.

Act No. 69 of the Legislature of 1861, authorizing the Town of Donaldsonville to issue the bonds sued upon in this case, and the law of 1853, now section 2448 of the Revised Statutes, prohibiting police

MUNICIPAL BONDS—Continued.

juries and incorporated towns and cities to contract debts without providing the means of paying them, are not inconsistent, and the later enactment did not repeal the previous one. Therefore, the Town of Donaldsonville is only bound on said bonds to the extent of the provision made for the payment of the same, by the levy of an annual tax of $1000 on the real estate of said town, during ten years.

The objection raised by Defendant, that such a tax is not uniform, and, therefore, is unconstitutional, is not tenable. The point fully examined.

Justilien Oubre vs. Town of Donaldsonville, 386.

3. It was a sufficient consideration for the bonds sued upon, that they were issued in settlement, by compromise, of outstanding claims against the municipal corporation, which had enured to the latter's benefit, and which were believed by the municipal authorities and the creditors to be valid and exigible.

The legality of those original claims cannot be examined in an action on the bonds issued in execution of such compromise.

Widow V. Dugas vs. Town of Donaldsonville, 668.

MUNICIPAL CORPORATIONS.

1. The right exists in the Council of a municipal Corporation to determine what, in its nature and use, it deems a *nuisance*, and to direct its removal or discontinuance under the penalties which it is, by legislative authority, empowered to impose or inflict. 10 An., 227.

City of Monroe vs. J. Gerspach, 1011.

NEW ORLEANS.

1. Judgments against the City of New Orleans, which are made inexecutory by law, cannot be compensated against. If they were compensable, they would be executory.

W. B. Schmidt et al. vs. City of New Orleans, 17.

2. The City of New Orleans cannot be compelled to accept ten mills in full payment of the city taxes of 1880, under the limitation fixed by Article 209 of the Constitution of 1879.

The power of taxation possessed by said City is not confined to that granted by that Constitution.

Her power of taxation required to meet her antecedent contract obligations, is not derived from, or controlled by, the State Constitution. It was derived from valid legislative authority existing at the time of such contracts, which formed part of them, and, therefore, rights acquired under them are protected by the Constitution of the United States, independently of the will of the State.

It was not the intention of the Constitution of 1879 to deprive the City

NEW ORLEANS—Continued.

of the right to apply such portion of the ten mills to the support of the city government as might be necessary, and thereby throw her into a state of anarchy.

The Decision in Shields vs. Pipes, 31 An., 765, a parallel case, commented upon and affirmed.

B. Saloy et al. vs. City of New Orleans, 79.

3. Act No. 74 of the Legislature of 1880, "To authorize the City of New Orleans to fund its floating debt, &c.," is not unconstitutional on the ground, that it is a local and special law passed in violation of Article 48 of the Constitution, because, if a local and special law, it is taken out of the operation of this prohibition by Article 250 of the same Constitution.

Nor is said Act No. 74 violative of Article 29 of the Constitution, which provides, that every law shall embrace but one object, and that shall be expressed in the title.

But, as said Act No. 74 only authorizes the funding of the *valid* indebtedness of the City of New Orleans, it does not comprise that part of its floating debt, amounting to about $1,000,000, contracted between the 2d of November, 1874, and 1st of January, 1880, in violation of the Constitutional Amendment of 1874, which prohibited the said City from increasing its debt in any manner or under any pretext whatever, and of issuing warrants for the payment of money except against cash actually in the treasury.

At the same time that that portion of the floating debt of the City, cannot be funded by virtue of said Act No. 74, yet the holders of such claims have vested rights upon the uncollected revenues of the City for the respective years in which the obligations were contracted; and, inasmuch as Act No. 74 affects those vested rights, it is unconstitutional.

Tax-Payers' Association et al. vs. City of New Orleans et al., Conroy, Intervenor, 567.

NEW TRIAL.

1. It was clearly within the power of the lower court, in the exercise of a sound discretion, to set the judgment aside, before signature, and grant a new trial. And that sound discretion was properly exercised in a case like this, in which interrogatories propounded under garnishment proceedings to a municipal Corporation, were not answered and were taken *pro confesis*, owing to the excusable oversight of its Mayor.

A. Marchand vs. Noyes et al., 882.

2. The question of diligence in procuring evidence is essentially of the province of the court below on an application for a new trial, and this Court will not interfere with the discretion of the District Judge in that respect.

State of Louisiana vs. T. Fisher, 1344.

NOVATION.

1. A mortgage creditor may treat as his debtor the vendee of the mortgaged property, who has assumed payment of the debt, without thereby creating a novation and discharging the original debtor. That discharge cannot be presumed, and must be established by clear and positive proof of such intention on the part of the creditor. In default of sufficient evidence to the contrary, it will be presumed that the creditor retained the old debtor at the same time that he accepted the new one.

E. Latiolais, Adm., vs. Citizens' Bank, 1444.

PARTITION.

1. Property acquired by an heir at a partition sale, and paid for by means of his heritable share, is his separate property, and does not fall into the Community of acquets and gains, as property acquired during marriage.

This vexatious question fully discussed and examined, and the authorities reviewed.

Difference between the text of the Code of 1808 and that of the Code of 1825.

Decisions in cases of Hache vs. Ayrand, 14 An. 178, and Breaux vs. Carmouche, 15 An. 588, overruled in that respect.

H. D. Troxler et al. vs. Colley, Sheriff, et al., 425.

2. When the wife, owning in her own right an undivided half of certain property, buys the whole of said property at a partition sale, one-half will be yet her separate property, but the other half will fall into the Community, unless she shows by proper evidence that she paid for it with her paraphernal funds.

Louise A. De Sentmanat, wife, &c., vs. Nelvil Soule, 609.

3. Grand-children, coming to the partition of their grand-father's estate, when their own father *died before* their said grand-father, are not bound to collate what their father received before his death, because they inherit in their own right, and not by right of representation. C. C. 1240. Re-affirming Decisions in 4 N. S. 557 and 23 An. 290.

N. M. Calhoun et al. vs. S. D. Crossgrove et al., 1001.

4. In a partition suit, the heirs of age have an absolute right to demand a sale for cash for their shares of the common property.

V. H. Dickson and Husband vs. H. P. Dickson, et als., 1370.

PARTNERSHIP.

1. A partnership between stevedores is not a commercial, but only an ordinary, partnership, and parties taking the promissory note of such a firm, do it at their peril, if the partner who issued the note, had no authority from his co-partner to do so.

W. S. Benedict et al., Executors, vs. Thompson & Torjusen, 196.

PARTNERSHIP—Continued.

2. The certificate of the Recorder of mortgages stating that an act of partnership *in commendam* was registed in the mortgage office, in a certain book, on which the number and folio are given, there arises a legal presumption that the registry was made in the manner prescribed by law, especially when no attempt has been made to disprove the truth and correctness of said certificate.

A partner *in commendam* may have with the firm he is thus connected, all the business transactions which a stranger could have, without thereby taking part in the affairs of said firm and rendering himself liable for its debts.

R. W. Rayne & Co. vs. Richard Terrell, 812.

3. Defendant was a member of a planting partnership, to which he made advances for the raising of a crop on a plantation belonging to the co-partners. The other partner died during the partnership: Plaintiff was appointed Curator of his estate and was authorized by Probate Court to continue the cultivation of the plantation. To this Curator Defendant rendered an account of his advances and sale of the crop, and paid over one-half of the net profits. The Curator accepted the account and received the money; but subsequently claimed one-half of the gross proceeds of the crop, in order to distribute the same under order of the Probate Court, and pay defendant ratably as a creditor of the estate. *Held* that the Curator was concluded by his acceptance of Defendant's account and receipt of the money, and that the settlement between them was final.

M. Dowling, Curator vs. H. Gally, 893.

4. A partnership from which the parties have excluded some of their respective property, is not an universal partnership under our Code.

An act of universal partnership must be registered in the Mortgage office, and the registry is necessary, *even between the parties*, to give such character to the partnership.

A partner who, in violation of the act of partnership, enters into another firm, does not thereby give the right to his original co-partner to claim a share in the profits of the new firm. The violation of the agreement may give rise to an action for damages; but, in as much as the said original co-partner could not be held, without his consent, for the debts of the new firm, he cannot claim that he was made a partner therein, even unaware, on the ground that the original partnership was an universal one.

A partner is estopped, in the liquidation of the partnership, from denying to the prejudice of his co-partner any of the entries in the books of the firm, unless he charges and proves error.

J. Murrell et al. vs. Mary E. Murrell et al., 1223.

5. The wife, as individual creditor of her husband, cannot compete with

PARTNERSHIP—Continued.

the partnership creditors of an insolvent firm of which he is a partner, in the distribution of the partnership assets. The fact that the other co-partners had retired from the firm and that the husband alone asked for a respite and made a surrender, does not alter the principle.

The partnership creditors share equally with the individual creditors in the individual assets.

E. J. Gueringer vs. His Creditors, 1279.

6. A party knowingly taking the note of a firm from one of the partners for his own debt, cannot hold the firm or the other partners liable without proof of the special authority or ratification, and the burden of proof of the special authority or ratification is in such holder.

Mechanics' & Traders' Ins. Co. vs. Richardson & Cary, 1308.

7. A partner cannot use the name of the firm as security for the debt of a third person or of *himself* without special authority from all those composing the firm. A party receiving such security under those circumstances, although not chargeable with actual *mala fides*, does so at his risk and peril, and cannot hold the firm and its other members responsible, unless upon proof of knowledge, consent or ratification. Review of English and American authorities.

Mutual Nat. Bank vs. J. P. Richardson et al., 1312.

8. One partner cannot, without the assent of his co-partners, bind the firm for his individual debt or that of a third person.

Where a partner, acting *apparently* beyond the limits of his authority, untruly states his co-partners' consent, his representations will not bind them, even in favor of parties dealing with him in good faith.

It is the duty of every one who deals with a member of a commercial partnership *out of the line of business* of such partnership, to require evidence of that partner's special authority to bind his co-partners,—and this at the risk and peril of said party.

Allen, Nugent & Co. vs. G. W. Cary et al., 1455.

PETITORY ACTION.

1. A judgment creditor can legally sue for the recovery of his debtor's property in the hands of third persons, in order to make it liable for his debt, and, for the purposes of his suit, he can legally assert all the rights of his debtor in and to the property.

Such a suit is not the Revocatory action, but is the nature of the Petitory action. 30 An. 733.

The prescription applicable to such a suit is that which governs the Petitory action.

Such an action being petitory in its nature, the tender and putting in default are not conditions precedent to the recovery of the property and of the fruits and revenues.

PETITORY ACTION—Continued.

The debtor, in such a suit, being made co-defendant with the actual possessors, and in his answer joining the Plaintiff and claiming the property as his own, will be viewed in the light of an intervenor in a petitory action.

W. B. Spencer vs. Goodman & Bradfield, et als., 898.

PLEADINGS.

1. An Exception to the right of Defendant to reconvene, should be urged *in limine*.

A party cannot take the chances of a decision in his favor on a voluntary submission of the merits of the cause, and then escape the effect of an adverse judgment upon such a plea.

B. Saloy et al. vs. City of New Orleans, 79.

2. The averment of Plaintiff, that he is in possession of property bought by him when he was a minor, is a sufficient averment of his ratification of his purchase after he became of age to enable him to revendicate the property against the seizing creditor of his vendor.

A. Duvic vs J. B. Henry et al., 102.

3. Plaintiff discloses no cause of action in a suit for damages on account of a malicious prosecution, when he does not aver the termination of the prosecution.

Henry T. Lawler vs. Alexander Levy, 220.

4. Defendant in an action for slander of title, by setting up title in himself, changes the suit into a petitory action, in which he becomes plaintiff, and he must succeed or fail on the strength of his own title, and not on the weakness of his adversary's.

Edward J. Gay vs. Thos. H. Ellis, 249.

5. In an injunction suit to restrain the execution of a judgment, the plaintiff cannot plead and prove matters which were at issue and have been adjudicated upon in the original suit between the same parties, on the ground that new evidence has been subsequently discovered.

A. L. Gusman et al. vs. L. DePoret et al., 333.

6. There is no improper joinder of actions and of parties, in a suit for actual and punitory damages, against the principal and the surety on an injunction bond.

E. Conery et al. vs. Temple S. Coons et al., 372.

7. When the plaintiff in injunction seeks to restrain the execution of a judgment, on the ground that the property seized belongs to him, and not the judgment debtor, the only issue in the case is that of ownership.

Miguel Basso vs. Benker, Sheriff, et al., 432.

8. An Intervenor in a suit by provisional seizure for rent of a stable, averring that he is the owner of the horses seized and that he pays rent to the lessee of the stable to keep said horses there, discloses a cause of action in his Petition of intervention.

Josephine M. King vs. Wm. F. Harper, M. Heyman, Intervenor, 496.

PLEADINGS—Continued.

9. It is not by writ of Injunction, but by that of *Mandamus*, that a judgment creditor of the City of New Orleans should proceed to compel its Mayor and Administrators, in preparing the annual budget of the city, to comply with the law by placing his judgment thereon and providing for its payment.

Such being the case, Plaintiff's petition for an Injunction discloses no legal cause of action.

Lawrence F. Barrett vs. City of New Orleans, 542.

10. The Court *a qua* ruled properly, that the Petition of intervention of the judgment debtor in the garnishment process against third persons, should stand as an Answer.

C. Kline vs. Parish, etc., 562.

11. An executrix, who is also the widow in community of the testator, being sued in the former capacity only, but raising, in her defense of the suit, the issue of her rights as usufructuary, will be personally concluded by the judgment, and cannot afterwards attack its validity on the ground that she was not cited in her individual capacity.

Widow J. A. Denegre vs. Widow A. P. Denegre, 689.

12. A document annexed to and made part of the Petition, controls the allegations thereof, in case of variance.

Teutonia Nat. Bank vs. J. M. Wagner et al., 732.

13. A suit brought in the name of a corporation without designation of any officer, will stand when, on trial of the Exception taken on that point, it is shown that the action was instituted by the President with the approval of the Board of Directors.

Insurance Oil Co. vs. John H. Scott, 946.

14. Defendant's Answer absolutely denying that he ever was a debtor of Plaintiff in the matter sued upon, he cannot pretend that the circumstances of the case, as disclosed by the evidence, show a novation of the original debt, by which he is released.

Consolidated Fruit Jar Co. vs. M. L. Navra, 995.

15. Defendant, having in his original answer admitted the adjudication to him, at a tax sale, of plaintiff's property, cannot be permitted to file an amended answer, setting forth error, possession in himself and other facts, which alter the substance of the original answer.

J. E. King vs. E. Gantt et al., 1148.

16. In a suit to set aside a settlement of partnership, on the ground that the same was based on error, an appointment of auditors of accounts by the court is proper to determine whether there have been in the settlement such errors as alleged; and Defendant, in moving to homologate the report of the auditors, waives no right of maihtaining the original settlement.

M. Keough et al. vs. C. W. Foreman, 1434.

PLEDGE.

1. It is well established that the pledgee of a note has the right to sue upon it in his own name.

Bank of Lafayette vs. Mrs. E. J. Bruff, 624.

2. The pledgee may have possession through a third person, chosen by him and the pledgor.

J. C. Weems, Rainey subrogated, vs. Delta Moss Co., 973.

3. Under Act No. 66 of the Legislature of 1874 (Sec. 3), cotton bought at Shreveport and unpaid for by the purchaser, but shipped by him for New Orleans, is in the possession of the consignee the moment the bill of lading is given to the common carrier for transmission, and said consignee has, from that time, a pledge upon the cotton, superior to the vendor's privileges.

Forsheim Bros. vs. Z. Howell, John Phelps & Co., Intervenors, 1184.

4. The shares of the capital stock of corporations are not "credits" within the meaning of the Code, and the pledge of such stock is perfect by the simple delivery of the Certificate of stock, without notice to the corporation.

The principle is binding upon the Corporation itself, whatever its by-laws may provide to the contrary.

The maxim of *stare decisis* should apply in this case.

A. Pitot, Sequestrator, vs. C. P. Johnson et al., 1286.

PRACTICE.

1. A defendant, who does not insist upon the trial of an exception before the case is tried on the merits, is presumed to have waived the exception.

T. J. Hickman, et al. vs. Mary J. Dawson and husband, et al., 438.

2. Plaintiff, alleging himself to have an interest in common with Defendants in a certain judgment against a third person, enjoined the judgment debtor from paying the amount of his interest to Defendants. The latter on Motion obtained the dissolution of the injunction.

HELD—For the purposes of the Motion to dissolve the injunction, the averments of the Plaintiff's petition must be taken for true. Therefore, as part owner of the judgment, Plaintiff had the right to enjoin the judgment debtor from paying his share of it to Defendants, and the injunction should not have been dissolved.

A. D. Rawlings, et al., vs. Mrs. M. J. Bowie, et al., 573.

PRESCRIPTION.

1. The acknowledgment of a debt by the administrator of a succession suspends prescription during the entire pendency of the administration. Reaffirming previous Decisions.

Seizure and notice, under execution of a twelve months bond, interrupts prescription, as in cases of executory process.

Emile Cloutier et al. vs. R. E. Lemee, Provisional Syndic, et al., 305.

PRESCRIPTION—Continued.

2. The claim of the Administratrix for having supported her mother during her lifetime and administered to all her wants, could only be prescribed by ten years.

Succession of Mrs. Hannah Newton, 621.

3. Citation against some of the solidary obligors, interrupts prescription against the others.

Vredenburg et al. vs. W. J. Behan et al., 627.

4. Failure to serve notice on defendant, of judgment rendered against him by default, is one of the informalities which are cured by the prescription of five years.

Widow A. Holt et al. vs. Liquidators of Hart & Hebert, 673.

5. When the administrator of a Succession applies for an order of sale of property to pay debts, and annexes to his Petition a list of the debts to be paid, it is a sufficient acknowledgment of such debts to interrupt prescription.

The acknowledgment of a debt by the administrator of a Succession, so as to interrupt prescription, may be made in other ways than the sacramental manner prescribed by Art. 985, C. P.

Michael Troendle vs. O. De Bouchel, 753.

6. A long line of authorities have established a distinction between the technical sufficiency of a citation, as a basis for the maintenance of proceedings and judgment, and its sufficiency for the purpose of interrupting prescription.

Citation for the purpose of interrupting prescription needs not be technically perfect either in form or service.

C. Satterley vs. Charles Morgan, 846.

7. The fact that the note, upon which the executory process issued, was prescribed on its face, and that the Administrator of the succession against which the suit was brought, did not plead the prescription, does not affect the validity of the sheriff's sale.

The prescription of five years, under article 3543, C. C., cures such informalities and irregularities in sheriffs sales as: a waiver of notice of order of seizure and sale by an Administrator of succession; postponement of the sale; and an adjudication for less than the inventory appraisement.

J. M. Munholland vs. Mrs. Scott et al., 1043.

8. The plea of interruption of prescription, after the latter has been acquired, can only be supported by written evidence.

Julie Cormier, Adm., vs. T. DeValcourt, Adm., 1168.

9. A defective and insufficient description of the property sold, in the sheriff's advertisement, is cured by the prescription of five years as established by Art. 3543, C. C. Previous Decisions affirmed.

PRESCRIPTION—Continued.

The purchaser who knew the defect in the title of the property he purchased, and, owing to such defect, got the property for much less than its value, cannot be considered as a purchaser in good faith, in the legal sense of the word, and is not protected by the prescription of ten years.

The prescription of three years does not apply to the rents and revenues of property claimed in the petitory action, against a purchaser in bad faith.

Walling Heirs vs. A. S. Morefield, 1174.

10. An executrix who has, by error, acknowledged in writing on the back of a note that the same was still due, may be heard as a witness to prove that the written date of such acknowledgment is false, and that, in fact, she signed the acknowledgment at a time when the note was already prescribed.

Succession of Walter O. Winn, 1392.

11. Under the principle of *stare decisis*, this Court will not disturb the rule established by numerous Decisions, that prescription was not suspended during the late civil war in this country.

Ibid.

12. This Court does not consider the rule of suspension of prescription established in Section 1048 of the United States Revised Statutes, as intended by Congress to be acknowledged and enforced by State Courts. The isolated case of Stewart vs. Cohn, 11 Wall. 493, is not acknowledged as authority, and that of Aby & Catchings vs. Brigham, curator, is overruled.

Ibid.

13. The notes furnished by a stockholder of the Citizens' Bank for the amount borrowed by him, are not prescribed so long as his certificate of stock remains deposited and pledged to the Bank, under the provisions of its Charter.

E. Latiolais, Adm., vs. Citizens' Bank, 1444.

PORT OF NEW ORLEANS.

1. What, under the laws of Congress and of this State, constitutes the Port of New Orleans.

A Branch Pilot of the Port of New Orleans, who has his domicil in the Parish of Orleans, must be sued in said Parish under the "Intrusion Act," and not in the Parish of Plaquemines, on the ground that such a person has no land domicil and that his functions are exclusively exercised within the latter Parish.

The State ex rel. J. C. Egan, Attorney General, vs. Hiram Follett, 228.

PRIVILEGE.

1. An agent employed to solicit sales of the goods of a manufacturer, with a monthly salary and a commission on all sales affected by

PRIVILEGE—Continued.

him, is not a clerk within the meaning of the law, in respect to the privilege for the payment of salaries.

A judgment, recognizing the privilege of a creditor, does not conclude other creditors in a *concurso* and only makes a *prima facie* case against them.

J. C. Weems, Rainey, subrogated, vs. Delta Moss Co., 973.

PROHIBITION.

1. This Court will not issue the writ of Prohibition where the evil complained of may be remedied by Appeal.

The mere apprehension that two courts, trying cases between the same parties, may issue conflicting orders to the injury of the Relator, is not a sufficient cause for this Court to interfere, by anticipation of the conflict, in the proceedings of one of the two courts, and issue the writ of Prohibition against the judge thereof.

The writ of Prohibition is not one of right, and should only issue in case of usurpation of power of jurisdiction by the lower court. 32 An. 1186.

State ex rel. Jos. Hernandez vs. Judge, etc., 923.

PUBLIC OFFICERS.

1. Act No. 44 of 1877, providing that the Clerk of the District Court shall be *ex officio* member of the jury Commission, does not confer upon him an additional office, in violation of the Constitutional restriction.

State of Louisiana vs. John Somnier, 237.

2. The Governor has the power to fill vacancies occurring by death, resignation or removal, during the interim between the sessions of the Legislature, subject to confirmation by the Senate, when it meets. Affirming Decision in 32 An. 934.

The Inspectors of weights and measures for the several Districts of the City of New Orleans, are State, and not Parish, officers.

Therefore, sec. 3924 of the Revised Statutes, which provides for their removal by the Governor for a certain cause, is not repealed by Art. 201 of the Constitution, which provides for the removal of Parish or municipal officers, by judgment of Court.

In the exercise of the power, given to him by law, of removing public officers for certain causes, the Governor is the sole judge of the existence of such causes, and his action of removal is final and irreversible by the Judiciary.

The State ex rel. Attorney-General and William Martin vs. V. Lamantia, 446.

3. The State has the undeniable power to prescribe qualifications as conditions precedent to the right to hold office, and, in ordaining such qualifications, the State Constitution could enact provisions with a retrospective effect, without violating the Federal Constitution.

PUBLIC OFFICERS—Continued.

Article 171 of the Constitution, providing for the ineligibility of public officers for certain causes, was intended to have a retroactive operation as well as to provide for the future.

The reason, object and means of enforcing said Article 171, fully considered.

In an issue as to the eligibility of a public officer under the same Article, the *discharge obtained by him from the competent authority* cannot be attacked collaterally. It must be done directly, and the discharge must be averred to have been obtained by fraud or error.

The admission of Defendant, that he has made no settlement with the School Board of the Parish for School funds, though coupled with the allegation that he has disbursed more money than he received, on account of said Board, and that his vouchers have been filed with the State Auditor,—is a full solution of the question at bar. As he has not obtained his discharge from the proper authority, the School Board, he is not eligible under Article 171.

The State ex rel. Howell, District Attorney, &c., vs. Echeveria, sheriff, et al., 709.

4. Absence of a public officer from the place where he holds his office, caused by sickness and medical treatment, does not amount to the change of residence, for which, under Article 195 of the Constitution, the office is vacated.

W. H. McGregor vs. R. W. Allen, 870.

5. A public officer vacates the office held by him by accepting another office incompatible with the former. 32 An. 193.

State of Louisiana vs. J. Dellwood, 1229.
Same vs. M. West, 1261.

PUBLIC USE.

1. The rents of property dedicated to a Parish for public use, are, like the property itself, exempt from seizure for debt, even if the object of the dedication has been abandoned or changed by the municipal authorities of the Parish.

C. Kline vs. Parish, &c., 562.

RECONVENTION.

1. The reconventional demand being for less than $1000, this Court has no jurisdiction to revise the judgment rendered thereon.

J. A. Stevenson vs. Whitney, Tax Collector, et al., 655.

RECORDER OF MORTGAGES.

1. The Recorder of Mortgages is responsible for the amount loaned on mortgage, on the faith of his Certificate that the property mortgaged was free of previous encumbrances, when in point of fact, the said property was mortgaged for more than its value, and the money loaned is thereby lost to the lender.

RECORDER OF MORTGAGES—Continued.

Such an action against the Recorder of Mortgages is on his official bond and, therefore, *ex contractu*, and not prescribed by one year.

David R. Fox vs. C. B. Thibault et al., 32.

2. The Recorder of Mortgages cannot be held responsible for the loss of the legal mortgage of the wife, by the inscription of the marriage contract in the book of Donations, previous to the legislation which requires that such mortgage be recorded in the book of Mortgages. At that time, the inscription of the contract in the book of Mortgages would have had no more effect than the same in the book of Donations, inasmuch as the legal mortgage of the wife existed without inscription. The Recorder could not be expected to have anticipated the change of legislation. It was for the wife herself to have complied with the requisites of the new law.

Marie E. Martin, Wife, &c., vs. Pierre Landreau et al., 676.

RECUSATION.

1. When a judge is recused on account of interest in the cause, he cannot himself decide the issue raised on that point by his denial, but must refer it, to be tried as provided by law.

The State ex rel. Tyrrell vs. Judge, etc., 1293.

REGISTER OF CONVEYANCES, PARISH OF ORLEANS.

1. The Register of Conveyances of the Parish of Orleans is by law bound to furnish to the Board of Assessors a monthly statement and certificate of all conveyances recorded in his office, without requiring stamps or making any charge therefor.

The State ex rel. John C. Bach vs. Recorder of Conveyances, 223.

REGISTRY.

1. Registry of an act of sale under private signature, is sufficient notice to third persons, of the mutation of title, without proof of the signatures of the parties to the act. Distinction between the effect of registry of an act of sale, as to notice, and the effect of the act itself as proof of title. Previous Decisions affirmed.

J. W. Stallcup vs. J. L. Pyron, 1249.

REHEARING.

1. The application of an *Amicus curiæ* for a Rehearing, though made within the six judicial days, does not retard the finality of the judgment of this Court.

Life Association of America vs. G. L. Hall, 49.

2. The very object of an application for a rehearing is to have this Court reconsider whether or not there is error in the Decision *rendered on the record such as it is.* When there is no such error, the rehearing must be refused. If the record is defective, it is not after judgment rendered in this Court, that it can be corrected. Bacas vs. Smith, 33 An. 142, affirmed.

J. P. Maritche vs. Board of Liquidation, 588.

REMOVAL TO U. S. CIRCUIT COURT.

1. An appeal lies to this Court from an order of a State Court removing a cause to the Circuit Court of the United States.

A suit involving a Federal question, within the provisions of Sec. 2 of the Act of Congress of March 3d, 1875, is removable by the State Court to the Circuit Court of the United States.

Mrs. Eliza C. Johnson vs. New Orleans National Banking Association et al., 479.

2. In this controversy, the Plaintiff and some of the defendants were citizens of Louisiana, and the other defendants citizens of Vermont. One of the latter applied for the removal of the *whole suit* to the Circuit Court of the United States, under the laws of Congress, on the ground of prejudice and local influence against her. *Held* that, under none of the Removal Acts of Congress, could her application be granted. Those laws examined *seriatim* in the Decision.

Geo. A. Stafford, Executor, vs. H. M. Twitchell et al., 520.

3. A mere auxiliary proceeding, by which a third person comes in by way of injunction, to protect his property from being seized and sold under a judgment to which he was not a party, is not removable, under the Act of Congress of March 3d, 1875, from the State to the Federal Court. Affirming Watson vs. Bondurant, 30 An 1.

M. Ada Calhoun and Husband vs. L. L. Levy et als., 1296.

RES JUDICATA.

1. The judgment of the Circuit Court of the United States in Louisiana, dismissing the plaintiff's suit without any reserve for the renewal of the action, is not a judgment of nonsuit: it concludes the parties and constitutes *res judicata* when final.

Mary C. Bledsoe et al. vs. M. P. Erwin et al., 615.

2. When the question of jurisdiction has been decided by the lower Court on an exception, and this Court, in adjudicating upon the merits of the case, says that it does not notice the Exceptions because it was virtually waived by the Answer, the ruling of the lower Court constitutes *res judicata* between the parties on the same question of jurisdiction.

Widow J. D. Denegre vs. Widow A. P. Denegre, 689.

3. A judgment cannot be disturbed on appeal between the Appellees and, therefore, as to them, remains *res judicata* independently of the action of this Court.

V. H. Dickson and Husband vs. H. P. Dickson et als., 1370.

RESPITE.

1. On the trial of Oppositions to the application of a debtor for a respite, the creditors cannot propound interrogatories to him, such as, whether he had disposed of his property during the pendency of the respite proceedings, when the Oppositions contained no such charges, but only averred that he had not placed all his property on his schedule.

RESPITE—Continued.

It seems that it is no good ground of opposition to the application for a respite, that the debtor placed on his schedule parties who were not his creditors, because, by so doing, he cannot prejudice the real creditors, and any of the latter, though not on the schedule, can by making oath, vote at the meeting.

In the absence of charges and proof of dereliction of duty, the notary appointed by the Court to hold the meeting of the creditors, had the power, in the exercise of his sound discretion, to adjourn the meeting.

The majority in number and in amount, required for a forced respite, is that of creditors, whether placed on the bilan or not, who have appeared at the meeting, taken the oath prescribed by law, proved their claims and voted for the respite.

The respite and insolvency laws are perfectly distinct. The former rest upon the apparent solvency of the debtor, and are not suspended or affected by the general bankrupt law of the United States.

T. C. Anderson vs. His Creditors, 1155.

REVIVAL OF JUDGMENT.

1. The Fifth District Court of the Parish of Orleans, created under the Constitution of 1868, had jurisdiction to revive a judgment rendered in the year 1867 by the Fifth District Court for the Parish of Orleans, created under the Constitution of 1864.

A suit is still *pending* in a court as long as the judgment is not satisfied or prescribed.

The proceeding to revive a judgment is not a new suit, but part of the original action.

Whether the writ of *fieri facias* issues under the original judgment or that of revival, is immaterial; in either case it is legal.

C. Scherrer vs. Caneza, sheriff, et al., 314.

2. In an action to revive a judgment, the defendant cannot set up in opposition to the revival, irregularities or relative nullities with which the original judgment was affected. In such an action, the sole questions that can arise or be determined, are, whether the judgment sought to be revived, was ever rendered, and whether it still exists or has been extinguished in any of the ways provided by law. It is only to the revival of judgments which are absolutely void, as for want of citation or other like radical defects, that opposition can be made on the ground of nullity of the judgment.

Folger & Son vs. W. S. Slaughter, et al., 341.

3. In a suit to revive a judgment against a bankrupt, his assignee is the proper person upon whom to serve the citation, if he is still in office, but not if he has been legally discharged by the Bankrupt

REVIVAL OF JUDGMENT—Continued.

Court, and is, consequently, *functus officio.* In the latter case, the citation served upon the ex-assignee has no legal effect whatever.

Grayson, Executor, vs. E. E. Norton, Assignee, 1018.

4. Under the laws creating the Parish of Grant, a judgment previously rendered by the District Court of the Parish of Rapides, cannot be revived by the same Court. It is the Court of the Parish of Grant, to which the suit, in which the judgment was originally rendered, is transferred, that has jurisdiction of the revival.

Article 3547, C. C., under which judgments are revived, did not provide an exclusive mode of preventing the prescription of such judgments. Affirming 30 An. 1071.

It is urged on the Rehearing that the citation in the revival suit, though brought before an incompetent court, interrupted the prescription of the judgment. The Court does not pass upon this point and leaves the parties at liberty to raise the issue in some other proceeding, but strikes from its original decree that portion which sustained the plea of prescription.

M. Ada Calhoun and husband vs. L. L. Levy, et als., 1296.

REVOCATORY ACTION.

1. This is a case of fraudulent *dation en paiement* set aside by the Revocatory action, in which the plaintiff obtains judgment, decreeing that he should be paid out of the property thus unlawfully transferred, by preference over the other creditors of the fraudulent debtor, in consequence (it seems) of his having had the transfer annulled by his suit.

Alfred Marchand vs. W. Van Norden et al., 803.

2. When immovable property has been sold by authentic act, valid on its face, and accompanied by actual delivery and continuous possession and control by the vendee as owner, a creditor of the vendor cannot seize the property in disregard of the transfer; and, when enjoined by the vendee, such seizing creditor will not be allowed to allege and prove that the sale is a fraudulent simulation. Review of the whole jurisprudence of Louisiana on this subject.

The title of the vendee, under such circumstances, can only be attacked in a direct action in avoidance of the sale, whether revocatory or *en déclaration de simulation.*

And, in such direct action, whether revocatory or *en déclaration de simulation,* the plaintiff must aver and prove that the act sought to be avoided operatates injuriously to him.

J. W. Willis, Jr, vs. Scott, Sheriff, et al., 1026.

SALE.

1. The purchasing broker in this case was the agent of Plaintiff and not that of both parties.

In the sale of goods by merchants, who were not the manufacturers thereof, where there has been no deceit practiced, and where the means of knowledge were at hand and equally available to both parties, and the subject of purchase was alike open to their inspection, if the purchaser did not avail himself of these means and opportunities, he will not be heard to say, in impeachment of the contract of sale, that he was deceived by the vendor's misrepresentations.

J. Rocchi vs. Schwabacher & Hirsch, 1364.

SCHOOL LAND.

1. In default of satisfactory proof that the lot of ground claimed in this case as school land, was ever selected as such under the Act of Congress, this Court holds that there should be judgment of nonsuit against the Plaintiff, without passing upon the issues of title and prescription raised by the pleadings.

School Board vs. Rosa B. Rollins, et al., 424.

SEIZURE.

1. An action for the recovery of real estate and damages, is liable to seizure.

Notice of seizure of such an action to the Clerk of the Court, in which the suit is pending, to the defendant in the suit and to the plaintiff therein, is proper and sufficient, and constitutes a valid seizure.

The appraisement in a case of such seizure, should be as in other cases of seizure of incorporeal rights.

The advertisement of the Sheriff for the sale of such a claim, should be during thirty days, as for the sale of immovables.

The purchaser of the claim in such a case, being the defendant himself against whom the action is brought, has the right to plead confusion, in a rule against the plaintiff in the action, taken for the purpose of having the suit dismissed.

Miss Kate Nugent vs. John McCaffrey, 271.

2. A defendant in execution cannot enjoin the sale of his property by the sheriff, on the ground that no valid seizure has been made of the same.

The defendant in execution who complains that the sheriff has seized more property than necessary, must proceed under Article 652, C. P., and not by injunction, to have the seizure reduced.

It is no valid ground of injunction for the defendant in execution, that the sheriff has seized property which does not belong to him.

An attachment having been maintained, cannot be a legal cause of action for damages.

SEIZURE—Continued.

The seizing creditor, who has given no instructions to the sheriff for the keeping or administering of the property seized, cannot be held responsible for the illegal manner in which that officer discharged his duty.

A. L. Gusman et al. vs. L. De Poret et al., 333.

3. The seizure of immovable property vests in the sheriff the right to receive the fruits or rents from the date of seizure, for the benefit of the seizing creditor.

W. F. Anderson vs. C. Comeau, 1119.

4. The sheriff who, in execution of a writ of attachment, leaves a sum of money in the hands of a third person, and takes the latter's receipt for the same, constitutes said third person his keeper of the money seized, and is himself, to all intents and purposes, in the legal possession thereof.

Upon dissolution of the attachment, the sheriff must account to the defendant for said sum of money as if he had actually received and held it under the writ.

L. B. Watkins vs. Cawthon, 1194.

SERVITUDES.

1. Article 660, C. C., relating to the predial servitude of drain, is to be liberally construed in favor of the estate to which it is due. Previous decision affirmed. *Held* accordingly, that the owner of an estate whose waters flow by natural drain on the lands of his neighbor, has the right of cutting ditches or canals by which the waters may be concentrated and their flow increased beyond the slow natural process, by which they would ultimately reach the same destination.

Apparent predial servitude acquired by the prescription of ten years.

A. Guesnard vs. Executors of Bird, 796.

SUCCESSIONS.

1. A succession may be legally and validly renounced by a judicial declaration made to that effect by the universal legatee, in the Petition presented by him to the Court of Probates to be confirmed testamentary executor under the will. Article 1017 of the Civil Code is not exclusive of other modes of renunciation.

Carter, Congreve et al. vs. John P. Fowler et al., 100.

2. Labiche died in 1872, leaving certain heirs at law, who claimed his estate against one another. They subsequently made a compromise between themselves, by which some of them sold their rights to the others, who, thereupon, entered into possession of the estate and sold its property at public auction. Dupuy bought the property. He afterwards died, and the same property was sold by order of the Probate Court, and bought by Lacroix. This purchaser refuses to accept the title, because, in 1877, five years after the death of La-

SUCCESSIONS—Continued.

biche, his last will was discovered, by which he instituted his same legal heirs, his universal legatees, and made a number of money legacies.

Decided that the title is good and the purchaser in no danger of eviction, because the Compromise between the heirs of Labiche was made by all parties in view of the existence of a will and is binding on all of them, and because the special legatees have not recorded their legal mortgage against the property of the testator.

Succession of Francois E. Dupuis, 277.

3. The right of creditors of a succession to have the property thereof sold by the Executor to pay their claims, is absolute and in no manner dependent upon, or to be preceded by, an Account of Administration or Tableau of distribution.

Succession of M. L. Tabor, wife of James R. Devall, 343.

4. An executor sold some property of the estate by order of court, and with the proceeds paid the first mortgage creditor, before filing an Account and Tableau of distribution and without authority from the court. The second mortgage creditor called for an Account, and as, by the time it was filed, the inscription of the first mortgage had peremptied and the debt it secured was prescribed, he opposed the Account, on the ground that the payment made by the executor without authority was not valid, and that, at the time the Account was filed, the only time when payment could be made, his second mortgage had become the first by peremption of the latter and prescription of the debt.

Held that, inasmuch as by the fact of the judicial sale, the first mortgage had been transferred to the proceeds, no re-inscription was necessary; and that, though payment by executors without authority should be deprecated, as, in this instance, the first mortgage creditor was the party entitled to the proceeds of the sale, at the moment they were paid to him, the executor should be credited with the amount paid and could not be condemned to pay it twice; and that an executor is entitled to credit for an irregular payment, if made to the proper party, whether the opposition is made by the heirs or creditors.

Succession of S. O. Rhea, 369.

5. It is discretionary with the judge of the Probate Court, on the application of the administrator of a succession, to cause the property ordered to be sold to pay debts, to be re-examined and re-appraised by the experts.

This re-appraisement can be made at any time before the sale.

It is only when the creditors demand it, that the property of a succession must be sold for cash. In the absence of such demand from the

SUCCESSIONS—Continued.

creditors, it is legal and proper for the Court to order the sale to be made partly for cash and partly on credit.

When property of a succession is sold to pay debts, on the application of the administrator, whether there are minor heirs or not, the adjudication can legally be made at the two-thirds of the appraisement.

It is only when the creditors demand the sale under Article 990 C. P., that the full appraisement must be reached.

Successions of J. B. Hood and Wife, 466.

6. A testamentary executor, who is also a universal legatee, although he has been recognized by the Probate Court in the two capacities and ordered to be put in possession, can be compelled to give security under Article 1670, C. C., if he has continued to act as executor.

After the order to give bond has been rendered by the Court, the executor cannot, to prevent its execution, raise any issue as to the merit of the creditor's claim.

The giving of bond does not admit the creditor's claim, which may be afterwards contested in other proceedings.

Succession of John Frazier, 593.

7. The statutory prohibition against purchases by administrators of successions, of the property thereof, is in favor of the creditors and heirs; and, therefore, the nullity of such purchases is not so absolute that they cannot be ratified or acquiesced in by the interested parties.

S. C. Prothro et al. vs. J. E. Prothro et al., 598.

8. A creditor of the heir of an estate, to whom the latter has granted a special mortgage upon the property thereof, cannot proceed *via executiva* and have that property seized and sold, while the succession, of which it forms a part, is still under administration, so as to strip the Administrator of the possession necessary for a liquidation of the affairs of the estate.

M. Dreyfus, Executor, vs. Richardson & May, 602.

9. A suit brought against a succession by the widow of one of the heirs, claiming the usufruct of her deceased husband's share of the estate, is not a real action or one of revendication, and can be brought against the executor alone, without making the heirs parties to it.

The court in which a succession is opened, has sole jurisdiction *ratione materiæ* to construe the will of the testator and to ascertain and pass upon the claims of parties asserting rights under or by virtue of it.

Widow J. A. Denegre vs. Widow A. P. Denegre, 689.

SUCCESSIONS—Continued.

10. The liability of the agent of an executrix for the illegal management of the affairs of the estate, is to his principal and not to the heirs. The claim of the latter for any loss which such agent may have caused the estate, is against the executrix.

The Executors in this case cannot be charged with the loss of funds in the hands of certain bankers in France, because they were authorized by the will of the testator to leave those funds there.

The Executors have no right to account on the *gold basis* for the pounds sterling, francs and other assets of the estate, converted into the United States currency. What the pounds sterling, francs, etc., realized in currency, should be accounted for in currency.

In default of a charge of malfeasance, the Executors cannot be held responsible for the difference between what the funds in Europe did realize and what they would have realized in 1865, had they then been converted by the Executors, because the matter was left to the discretion of the latter by the testator.

Heirs living in the family residence and rendering valuable services to the estate, cannot be charged with board and lodging, in the absence of substantial evidence of an agreement to that effect.

Mrs. A. P. Denegre vs. Widow J. D. Denegre, 694.

11. The nullity of purchasers by administrators of successions, of the property thereof, though absolute in one sense, may be ratified by the parties in interest.

The receipt of the price of sale by the heirs would be a sufficient ratification, if made with knowledge of the facts from which the nullity resulted.

The Defendant, urging that Plaintiffs cannot assail the legality of the sale because they have ratified it, should have specially pleaded the estoppel and cannot set it up under the general issue. Such defense is analogous to that of payment, release, novation, etc., and must be specially pleaded.

In a suit by the heirs for the recovery of property thus bought by the administrator, the tender of the price of sale is not necessary as a condition precedent. All that equity requires in such case, is to permit the defendant administrator to claim the amount in reconvention.

The plea of the necessity of tender of the price of sale should be set up *in limine* or, at least, specially.

The defendant administrator in such case is, in the sense of the law, a possessor in bad faith and, as such, bound to the restitution of fruits and revenues.

On the other hand, he is entitled to reimbursement of necessary ex-

SUCCESSIONS—Continued.

penses for the preservation of the property, under Article 2314, C. C., and to proper compensation for constructions and improvements, under Article 508, C. C. There is no reason to say that this article does not apply to possessors in bad faith.

Heirs of Wood vs. Joseph Nicholls, 744.

12. When the heirs of a deceased person have made proof of his death and of their heirship, though *ex parte*, and have been recognized as heirs and sent into possession, the succession of the decedent has been opened and closed. And thereafter, any *mortuaria* proceedings and decrees for the appointment of an administrator or curator, are null and void and of no legal effect. Until the original *mortuaria* are rescinded and set aside, or re-opened, by proper action of the court in which they were instituted, they stand as a perpetual bar to the demand of creditors for a judicial administration of the estate of the deceased. The recourse of such creditors is a personal action against the heirs who have thus been put in possession.

R. T. Beauregard, Curator, etc. vs. Julia A. Lampton, 827.

13. In estimating the active mass of a succession, the valuation in the inventory is not conclusive, and the true value of the property may be shown by other proofs.

In fixing the amount of the legitime of the forced heir, the funeral expenses and law charges must be considered as debts and be deducted from the active mass of the succession.

Succession of Lizzie Dean (Mrs. E. V. Mahood), 867.

14. A judgment on an Opposition to the Account of the Administrator may validly decree his destitution and that he should pay a certain sum of money for which he is liable to the estate, when a direct suit was first brought by the Opponent, praying for his dismissal for mal-administration, and the direct suit and the Opposition were cumulated and tried together.

Diana C. Gray, et al., vs. Waddell, Administrator, 1021.

15. The Administrator of a Succession, who has placed a privilege creditor, as such, on his account and tableau of distribution, cannot afterwards pretend to amend his tableau and recognize such creditor only as an ordinary one, on the ground that the acknowledgment of the privilege was made in error of fact, without proving, not only the error, but, also, that he was ignorant of it, at the time he presented the original account.

The fact that a privilege creditor has received part payment of his claim by anticipation and from the general funds of the estate, will not prevent him from being paid the full balance of his claim out of the particular fund upon which he has a special privilege.

Succession of T. S. Mulhern, 1047.

SUCCESSIONS—Continued.

16. A natural child, pretending to have been legally acknowledged by her deceased parent, can oppose the application of collateral heirs for the administration of the succession of said deceased parent, without having first been judicially decreed to be an acknowledged natural child, as claimed. The proof of patronage and acknowledgment may be made on trial of the Opposition to the application for administration.

The restriction contained in Article 221 of the Code of 1825, viz: "No other proof of acknowledgment shall be permitted in favor of children of color," having been repealed by elimination from the Code of 1870, children of color have now, whatever be their descent, the right to prove their acknowledgment in the same manner as white children.

A child whose parents, at the time of conception, could not contract marriage because one of them was a colored person, could legally be acknowledged after the prohibitory law was abolished.

The mother, in this case, was deaf and dumb, and was, several years after the acknowledgment, interdicted for insanity. These reasons were also urged to show the illegality of the acknowledgment, but were overruled by the Court.

Succession of Melasie Hebert, 1099.

17. No administrator should be appointed to a succession which is not burdened with debts and requires no liquidation.

Ibid.

18. Act No. 106 of the Legislature of 1880, giving power to the Clerks of the District Courts, throughout the State, the Parish of Orleans excepted, to appoint administrators of successions, does not dispense them with the necessity of rendering an order in making the appointment; and, until such an order is rendered, the appointment is invalid and a party with a better right to such appointment, is in time to present his application.

Succession of A. Picard, 1135.

19. A testamentary executor who has qualified as such, cannot be deprived of his commission on the amount of the inventory because the heirs and legatees agreed between themselves to make a distribution of the assets of the succession.

Succession of Mrs. J. Hopkins, 1166.

20. There is no inconsistency in the heirs bringing suit for the nullity of the sale of the property of the estate by the administrator, and, at the same time, demanding that the administrator be ordered to file his account and be removed from office, and that they be put in possession.

Heirs of Thompson vs. Barrow, Administrator, et als., 1225.

21. A. had been living a number of years in New Orleans, where he own-

SUCCESSIONS—Continued.

ed real estate. He was unmarried, old and infirm. He left there, taking with him his furniture, and went to the Parish of St. Mary, to the house of his nephew, where he died a short time after he arrived. His succession was opened both in New Orleans and in the Parish of St. Mary. The question is: where did he reside when he died? *Held* that the circumstances of the case show his residence was in the Parish of St. Mary where he went with the intention of remaining; and that his Succession was legally opened there.

A. Verret vs. R. Bonvillain, 1304

22. Differently from an Administrator, a testamentary Executor, can appeal officially as Executor, from a judgment rendered against him and in favor of the succession.

Succession of Josephine Hale, wife of Ames, 1317.

23. An Executor is not entitled to favor in the assertion of merely technical pleas tending to exclude from judicial determination questions affecting the lawful distribution of the estate administered by him.

Ibid.

24. Demand of delivery or payment of a special legacy to entitled the legacy to interest, is expressly dispensed with when the legatee is himself the Executor. C. C. 1628-30.

Ibid

SUPREME COURT OF LOUISIANA.

1. Under the present Constitution, this Court has no jurisdiction when the matter in dispute exceeds $1000 only by adding interest to the principal.

State of Louisiana ex rel., Forman vs. Recorder of Mortgages et al., 14.

2. The practice tolerated by this Court, in view of expediting business and lessening costs, of considering as part of the Transcript of Appeal, records of other cases filed in this Court, must be exercised with discretion and within reasonable limits. When, therefore, other Transcripts are intended, by agreement of Counsel, to be used in this way, as part of the Record of the case at bar, reference must be made to the title and number of said other Transcripts, and the attention of this Court must be called to them, or it will not treat them as part of the evidence before it; and the defect shall not be remedied on application for a rehearing.

Succession of Patrick Irwin, 63.

3. The Constitution, laws and treaties of the United States are as much part of the laws of every State as its own local laws and Constitution, and the duty of this Court is to administer all the laws of the land, those of the United States as well as those of the State of Louisiana.

B. Saloy et al. vs. City of New Orleans, 79.

SUPREME COURT OF LOUISIANA—Continued.

4. This Court has no appellate jurisdiction over a suit between the contestants for a public office to which no salary or pecuniary perquisite is attached. Decision in State *ex rel.* Newman et al. vs. Hayles, 32 An., 1135, affirmed.

The State ex rel. Buckner et al. vs. Jastremski et al., 110.

5. This Court has already several times decided that, under Art. 90 of the Constitution of 1879, it has authority to issue remedial writs to all inferior Courts, even in cases in which no Appeal lies to this Court. In the future, defences of this character will be ignored.

State of Louisiana ex rel. Fredericks vs. Judge, &c., 146.

6. This Court, under the supervisory power granted to it by Article 90 of the present Constitution, and in the exercise of the original jurisdiction thereby vested upon it, can compel by *Mandamus* an inferior Court to try a case over which the latter has decided it has no jurisdiction, and which is not appealable to this Court.

The State ex rel. McGee, Snowden & Violett vs. Judges, etc., 180.

7. This Court will not use its supervisory power, under Article 90 of the Constitution, by the writ of *Certiorari*, to investigate whether or not, an inferior Court, in an unappealable case has decided correctly, when it has acted within the limits of its jurisdiction and in proceedings apparently legal.

The State ex rel. O. Valeton vs. Judge, etc., 255.

8. This Court will not use its supervisory power, under Article 90 of the Constitution, to compel a District Judge, who has appointed, according to his judgment and his conscience, one of two applicants tutor to a minor, to appoint the other applicant instead, on the ground that the latter is the party designated by the law. The Decree can only be reversed on Appeal, if illegal.

Nor is it an open question any more, that a *Mandamus* does not lie to control the exercise of the discretion of inferior courts, in a particular manner.

The State ex rel. Elizabeth Horsh vs. Judge, &c., 268.

9. In actions to enjoin the execution of judgments, as between the parties themselves, the jurisdiction of this Court depends on the amount of the judgment enjoined, and is not aided by the value of the property seized, or by the amount of the damages claimed by the appellant.

Mrs. Zulme E. Hearsey and Husband vs. Booth, Sheriff, et al., 300.

10. The Courts of Appeals are, under Article 90 of the Constitution, amenable to the supervisory authority and power of the Supreme Court, like all the other tribunals of the State, and, in that respect and for that purpose, they are *inferior* Courts.

The State ex rel. Widow Harper vs. Judges, &c, 358.

SUPREME COURT OF LOUISIANA—Continued.

11. Writ of *Certiorari* refused by this Court on the ground that, under the supervisory power, granted by Article 90 of the Constitution, it cannot pass upon the correctness of the judgment of an inferior Court, in an unappealable case, when said judgment appears on its face to have been legally rendered.

The State ex rel. J. Markey vs. Judge, &c., 378.

12. A final decree of this Court must be executed by the Court *a qua*, in the manner ordered in the judgment, and the inferior tribunal has no authority to inquire into the legality of the mode of execution so decreed.

Heirs of Stafford vs. Henry Renshaw, 443.

13. This Court has no authority to issue the writ of Prohibition, either in the exercise of its appellate or supervisory powers, unless it is to an inferior judge exceeding the bounds of his jurisdiction.

The State ex rel. Dowling vs. Mix, Sheriff, et al., 794.

14. This Court cannot review a criminal case on appeal, when the Transcript contains no bill of exceptions, no motion in arrest of judgment and no assignment of errors, and there is no defect in the proceedings patent on the face of the record.

State of Louisiana vs. J. W. Potter et al., 195.

15. An issue about the legal *status* of one of the parties, which requires the introduction of evidence to prove the facts alleged, cannot be raised in this Court.

Southern Mutual Insurance Co. vs. Mrs. Mary A. Pike et al, 823.

16. This Court, by virtue of the authority to it granted by Article 90 of the Constitution, orders the judge of the Second City Court to hear the evidence and pass upon the Exception to his jurisdiction, before proceeding further in the case.

The State ex rel. Hallisy vs. Judge, etc., 832.

17. In a suit to compel the Treasurer of the State by Mandamus to stamp six bonds of the State of Louisiana, for $1000 each, reducing the interest thereon, under the provisions of the ordinance of the Constitutual Convention of 1879, this Court has jurisdiction, because the amount in dispute is the interest on $6000, at the rate of two per cent. per annum for five years, three per cent. for fifteen years, and four per cent. thereafter until the year 1914, making an aggregate sum of $6660.

The State ex rel. Ecuyer vs. E. A. Burke, Treasurer, 969.

18. In a suit enjoining a seizure, a claim for damages cannot vest, or contribute to vest, this Court with jurisdiction. 30 An. 427, affirmed.

J. Lemle vs. Routon, Sheriff, et als., 1005.

19. The verdict of the jury, even as to the facts of the case, has no controlling influence upon the conclusions of this Court. It is its pro-

SUPREME COURT OF LOUISIANA—Continued.

vince and duty to reverse such verdict, as well as the judgment of an inferior court, when a careful examination of the record and review of the evidence show that the jury was mistaken as to the facts. To hold otherwise would be defeating the object of the law by which this Court is to review the facts as well as the law of the case.

Manlius Boon vs. B. F. O'Neal, 1187.

20. This case not coming within the appellate jurisdiction of the Supreme Court, and the Court of Appeals having neither usurped jurisdiction nor refused to perform any duty imposed upon it by law, this Court will not use in the premises its supervisory power under Article 90 of the Constitution. Previous decisions affirmed.

State ex rel. Gilmer vs. Judges, etc., 1201.

21. This Court will not issue the writs of Certiorari and Prohibition, in exercise of its supervisory power over inferior courts, except in cases of usurpation of jurisdiction or power. Previous decisions affirmed.

The State ex rel. M. Selles vs. Judge, etc., 1284.

22. This Court will not issue the writs of Prohibition and Certiorari to inferior judges in cases in which they have exercised their legal authority and discretion. Previous decisions affirmed.

The State ex rel. Dardenne, President, etc., vs. Judge, etc., 1356.

23. A judgment of this Court, declaring a State officer ineligible and his office vacant, commanding nothing to be done and upon which no writ issues, needs not be recorded in the court below to produce its legal effect. Such judgment becomes, upon its rendition, instantly operative.

In the case at bar, the judgment of this Court was rendered on a rehearing and no delay was necessary for its finality.

The State ex rel. Pugh, Coroner, etc., vs. Judge, etc., 1381.

24. It does not appertain to the inferior courts or judges of the State to determine or recognize the operation and effect of a writ of Error directed to this Court by the Supreme Court of the United States.

Ibid.

25. This case is a proper one for the exercise, by the writs of Mandamus and Prohibition, of the plenary powers granted to this Court by Article 90 of the Constitution.

Ibid.

SUPREME COURT OF THE UNITED STATES.

1. There exists a wholesome comity between the highest Federal tribunal and the highest Courts of the several States, under which the former accepts as binding upon it the construction placed by the latter upon their own Constitutions and statutes; and it is justly due that the latter should pay equal regard to the adjudications of the former.

SUPREME COURT OF THE UNITED STATES—Continued.

In all questions involving the meaning and effect of the Federal Constitution, the Supreme Court of the United States is the final arbiter, whose Decisions this Court must accept as the highest authority.

B. Saloy et al. vs. City of New Orleans, 79.

SURETYSHIP.

1. When the sureties have not pointed out property of the principal debtor and advanced the sum necessary for the discussion, and said principal debtor is notoriously insolvent, they cannot enjoin the execution of the judgment against them, on the plea of discussion.

The sureties of the sheriff cannot plead compensation against debts of the latter, for which they are responsible and which, by law, are not compensable, such as claims against him for moneys received and not officially accounted for.

W. B. Schmidt, et al. vs. City of New Orleans, 17.

2. The surety on an official bond cannot pretend that he is not liable because the law requires that such sureties should be residents of the State and he is not.

Sureties on a bond, binding themselves and each of them, are liable *in solido.*

The failure of the Board of School Directors to require regular accounts and settlements from their treasurer, does not discharge the sureties of the latter.

The Board of School Directors have the right to sue on the official bond furnished by their treasurer, though it is made payable to the Governor of the State.

Board of School Directors vs. A. V. Brown et al., 383.

3. The discontinuance of the suit against some of the solidary obligors does not discharge the other Defendants.

V. Vredenburg et al. vs. W. J. Behan et al., 627.

4. The surety is only discharged by a prolongation of the term of payment granted the debtor, when it is granted by a party having the legal authority to do so. The administratrix of a succession has no such authority ; and the fact that she was also widow in community does not give her any additional power in that respect.

Mrs. M. J. Jackson, Admrx. vs. Wm. C. Michie et al., 723.

5. The sureties of the cashier of a bank who, in the very bond signed by them, recognized the legal existence of that corporation, are estopped from denyieg that the bank had such legal existence at the date of the bond.

The sureties on such bond, though bound *in solido* with the principal, are *several* obligors *inter sese*, if the solidarity *between themselves* is not expressed. They are bound by distinct and separate contracts,

SURETYSHIP—Continued.

though such contracts are evidenced by only one act, the bond. Therefore, the discharge of one of the sureties by the common creditor does not release the other sureties.

The sureties of a bank officer are liable, not only for the acts done by him by virtue of his office, but also for those done under color or by means of his office.

Teutonia Nat. Bank vs. J. M. Wagner et al., 732.

6. The surety on a release bond cannot be held for a greater or different amount than his principal.

The obligation of the principal on such bond is to produce the property on the day of sale, and, in default thereof, to pay the amount of the judgment with interest and costs, but not the amount of the bond, nor the value of the property if it exceeds the amount of the judgment. 33 An. 416, affirmed.

J. Lemle vs. Routon, sheriff, et al., 1005.

TAXATION.

1. Condemnation of the theory, that taxes levied under the *Mandamus* of a Court constitute judicial taxation.

B. Saloy et al. vs. City of New Orleans, 79.

2. Exemptions from taxation must be strictly construed.

Baton Rouge R. R. Co. vs. Kirkland, Sheriff, et al., 622.

3. Municipal corporations have no inherent powers of taxation, but can tax only as the State has thought proper to permit.

The State ex rel. Emily E. Griffin vs. City of Shreveport, 1179.

TAXES.

1. The validity of the assessment of taxes for the year 1880 and the levy of the same in December, 1879, by the City of New Orleans, by virtue of the laws then in force, was not affected by the Constitution of 1879, or subsequent statutes. Decision in New Orleans vs. Vergnole, 33 An. 35, affirmed.

The summary mode of collection provided for by said Constitution and Act No. 77 of 1880, does not apply to the taxes levied by the City of New Orleans in December, 1879.

When property of a succession, upon which the said City has a privilege for the payment of her taxes, has been sold by order of the Court of Probates, that privilege is transferred to the proceeds and the City has the right to be paid out of the same, and, therefore, to oppose the account of the Executor.

The condition affixed to the sale by the order of Court, that the purchaser shall assume certain taxes, cannot bind the City who is no party to the proceedings or agreement, and compel her to sue the purchasers for the payment of such taxes.

Succession of Francois E. Dupuy, 258.

TAXES—Continued.

2. Whether taxes due on the property were recorded or not, Defendant cannot recover the amount paid for them by the sheriff out of the price of sale.

A. Reichard vs. F. Michinard et al., 380.

3. The assessment and judgment for taxes against a Succession, as such, are legal, when the heirs have not obtained and recorded a decree of court recognizing and putting them in possession. Affirming Decision in City vs. Stewart, 28 An. 180.

Carter, Congreve et al. vs. City of New Orleans et al., 816.

4. The special tax of twenty mills (in excess of the ten mills constitutional limit) levied on the 25th of September, 1880, by the Police Jury of the Parish of Concordia, for the purpose of building a levee on Lake Concordia, is unconstitutional and illegal.

The proviso of Act No. 96 of 1877, prescribing that "on the written application of majority in value of the tax payers of a Parish, the police jury shall be authorized to levy additional taxes, not in excess of five mills," is manifestly inconsistent with Article 290 of the Constitution and, therefore, repealed.

It is clearly the intention of the Constitution, that the proviso of Article 209, by which municipal taxes for works of public improvements, etc., may be levied beyond the ten mills limitation, should not be self-operative, and that the municipal authorities should not have the power to impose such additional and indefinite taxes, without legislative warrant.

James Surget vs Chase, Tax Collector, 833.

5. Coal brought from Pennsylvania to New Orleans for sale, can legally be taxed by the State of Louisiana, and the tax thus levied upon it is not obnoxious to any of the three constitutional principles invoked in this case, viz: 1st, that the citizens of each State shall be entitled to all the immunities and privileges of citizens of the several States; 2d, that Congress shall have power to regulate commerce, with foreign powers and among the several States; 3d, and that no State shall levy any imposts or duties on imports or exports.

S. S. Brown vs. Houston, Tax Collector, 843.

6. The laws, in existence at the time of the adoption of the Constitution of 1868, and by which all the property of the Poydras Orphan Asylum where exempted from municipal taxation, without discrimination, were not repealed or affected by Article 118 of the same Constitution, which provided that "the General Assembly shall have power to exempt from taxation property *actually used* for church, school or charitable purposes."

Nor did any subsequent legislation repeal, amend or affect the said laws.

TAXES—Continued.

All the property of the Poydras Orphan Asylum is, therefore, still exempt from municipal taxation, whether yielding an income, or simply used for the purposes of an asylum.

Rules for the interpretation of Constitutions and Statutes.

City of New Orleans vs. Poydras Orphan Asylum, 850.

7. Under and by virtue of the Constitutional Ordinance of 1879 and Act No. 49 of the Legislature of 1880, the interest, as well as principal, of the taxes due the City of New Orleans prior to to the first of January, 1879, may be paid in scrips or other proper evidences of indebtedness of said municipal corporation.

But the judicial costs incurred in proceedings against the delinquents, are not included in the relief law, and must be paid in cash.

City of New Orleans vs. Mrs. W. L. Jackson, 1038.

8. A judgment creditor of a municipal Corporation is not entitled to a Mandamus to compel the assessment and levy of a tax to pay his claim, when a tax, sufficient to that effect, has already been assessed and levied, but has not been fully collected. 31 An, 709.

Huey & Wise vs. Police Jury &c., 1019.

9. The Relator, having a judgment against the Parish of St. Martin for certain warrants, drawn under a Resolution of its Police Jury that they should be paid from the taxes of the years 1865, 1866, 1867 and 1868, seeks by Mandamus to compel said Parish to levy now a sufficient tax, according to the rolls of the current year, to pay said judgment. *Held* that the Relators right is limited to the terms and conditions under which the warrants were issued, and that he is not entitled to the levy of the tax prayed for.

The State ex rel. Nelson vs. Police Jury, &c., 1122.

10. Lands held indivision by several parties must be assessed as a whole in the names of all the joint owners and for the non-payment of taxes, must be seized and advertised for sale also as a whole, in proceedings directed against all the joint owners.

D. Hayes, Administrator, vs. Viator, Sheriff, et al., 1162.

11. The City of Shreveport by its Charter can only levy taxes for the ensuing year, after having made and published a budget of its contingent expenditures for said ensuing year. The debt sued upon in this case having been contracted by the City of Shreveport under the existence of its Charter, the Relatrix is not entitled to a Mandamus to compel the levy of a tax in any other manner or at any other time than as provided for in said Charter.

The State ex rel. Emily E. Griffin vs. City of Shreveport, 1179.

TAX SALE.

1. In a suit by a mortgage creditor to have a tax sale decreed null and void, and to have the property purchased from the tax collec-

TAX SALE—Continued.

tor, seized and sold in satisfaction of the mortgage, the purchaser sought to be evicted occupies the position of defendant in a petitory action, and has the right to show any and all titles under which he holds the property.

The question of the hypothecary rights of plaintiff against third persons, in such a suit, is prematurely presented and should be the object of another action.

A suit in nullity of a tax sale is only prescribed in three years from the date of the sale.

A tax sale may validly be made by a deputy of the tax collector.

The written notice to the owner or his agent, prescribed by Act No. 47 of 1873, is an essential prerequisite of the tax sale, and, in its default, the sale is null and void.

That informality may be taken advantage of by a mortgage creditor.

Marguerite Villey vs. Louis Jarreau et al., 291.

2. The right of redemption of property sold at a tax sale, given by law to the creditors of the former owner, is not confined to mortgage creditors.

When the tender is made according to law to the purchaser at the tax sale, for the purpose of redemption, his title, inchoate so far, is defeated, whether he accepts or improperly refuses the tender. From that time, a creditor of the former owner has the right to seize the property.

Miguel Basso vs. Blenker, Sheriff, et al., 432.

3. The well established rule of law, that the validity of a tax sale cannot be attacked collaterally, but only in a direct suit, does not apply to a petitory action, in which the defendant alleges the tax sale as his title. There, the plaintiff has the right to show the illegality of the title opposed to him, though it be a tax sale *prima facie* valid.

In such a case, all matters of defense set up in answer must be considered as open to every objection of law and fact, as if such objections had been specially pleaded.

T. J. Hickman et al. vs. Mary P. Dawson and Husband et al., 438.

4. When property, at the sale of the tax collector, was bid in for the State, and afterwards was redeemed by a mortgage creditor, by payment of the taxes for the amount of which it was adjudicated to the State, the owner, from whom the mortgage creditor claims back the redemption money, is not allowed to contest the original legality of the taxes.

The Ordinance of the Convention of 1879, for the relief of the delinquent tax payers, affords no assistance in that respect, to the party whose property has been redeemed as aforesaid.

Harvey Shannon vs. Mrs. Hannah Lane and Husband, 489.

TAX SALE—Continued.

5. An assessment of property in the name of L. H. Stafford or of L. A. Stafford is not an assessment in the name of the *owner*, when L. H. Stafford never was owner, and when L. A. Stafford had been dead for ten years; when the property had been vested in his succession, and when that fact had been formally notified to the proper officers and was ascertainable from the archives of their own offices.

A notice of the tax collector addressed to "B. S. Lee, agent of L. H. Stafford," is not a notice to the Succession of L. A. Stafford or to an agent of said succession.

A seizure of property as "the property of L. A. Stafford," is no seizure as against the Succession of L. A. Stafford; and the recording of such seizure is not the recording of a seizure against said succession.

A sale of property, belonging to the Succession of L. A. Stafford, as the property of L. A. Stafford, and for taxes due by L. A. Stafford as owner, is inoperative against said succession.

A transfer of the right, title and interest of L. A. Stafford in property, ten years after his death, operates no divestiture of the title of his succession.

The Plaintiff in this case was under no necessity to tender to Defendants the amount of taxes, costs, etc., for which the property was sold, as a condition precedent of his right of action. Guidry vs. Broussard, 32 An. 924, affirmed.

Defendants are not entitled to recover from Plaintiff the collector's fees, damages and costs of advertising, paid by them as part of the price of sale, because the property was not legally assessed, and Plaintiff was, therefore, not in default.

Geo. A. Stafford, Executor, vs. H. M. Twitchell et al., 520.

6. The notice to be given by the tax collector to the owner or agent and the return to be made by the latter, in assessment proceedings, are acts required to be done but once, and when once validly performed, have their full effect without regard to the subsequent changes of ownership. Therefore, if the owner dies after said notice and return, it is proper for the assessors to put on the rolls, instead of his name, that of his succession.

The former owner of property, sold by the tax collector, cannot complain of the insufficiency of the description of the property in the advertisement of sale, when the defective description is that given by the owner himself or his agent, in his return to the assessors. And parties, whose title is purely derivative from said former owner, have no better right to raise the objection.

A tax sale, like other judicial sales, when enjoined for only part of the property seized and advertised to be sold, is valid as to the portion which is not enjoined.

TAX SALE—Continued.

There is no force in plaintiffs' objection that the sale is invalid, because only consummated after the day the taxes passed into the list of delinquents, though the proceedings for the sale had been initiated long prior to that date.

M. Ada Lane and Husband vs. Succession of J. F. March et al., 554.

7. The purchaser at a tax sale, which is decreed null and void, is entitled to recover from the owner of the property such portion of the price of adjudication as went to the payment of taxes, but not the amount of the costs, penalties and interest. 33 An. 521.

A. H. Hopkins et al. vs. Succession of Mrs. M. Daunoy, 1423.

TRADE-MARK.

1. The infringer of a trade-mark cannot justify his wrongful act by showing that the plaintiff has violated some general law of the state not affecting his right to have a trade-mark, but on a different subject.

In the United States, trade-marks may be patented, and when the word *patented* is put on the label of the article sold, though the merchandise itself is not patented, but the word is used in reference to the trade-mark and not for the purpose of deceiving the public, the owner of the trade-mark will not be disentitled.

The words "Insurance Oil" are a legal trade-mark.

A trade-mark is not necessarily defective because it does not indicate the origin or ownership of the article.

The seller is as much entitled to protection in his trade-mark when his goods are manufactured by others under his orders and directions, as when he is himself the manufacturer.

Insurance Oil Company vs. John H. Scott, 946.

USUFRUCT.

1. A testator has made his will in the following words, viz: "It is my will and desire that my debts be paid and that my estate be distributed among my legal heirs, according to the laws now in force in Louisiana."

He left at his death a widow in community and three children.

Has he, by such a will, disposed of his share of the Community property and thereby deprived his widow of the usufruct of the same?

Decided affirmatively.

Succession of John B. Schiller, 1.

2. The husband in this case, having by his wife's last will the usufruct of her share of the Community, and, whilst acting as her Executor, having sold for Confederate money cotton belonging to the Community, is held to have sold it as usufructuary and not as Executor, and to be liable for its value.

Succession of Sarah E. Hayes, 1143.

USUFRUCT—Continued.

3. At the expiration of the usufruct, whether by death of the usufructuary or by judgment of Court for abuse, leases and mortgages placed upon the property by the usufructuary cease to have any effect.

V. H. Dickson and husband vs. H. J. Dickson, et als., 1370.

WILL.

1. The controversy is on the proof of an olographic will, between the universal legatee and the heirs at law. The lower Court gave judgment against the legatee for want of legal proof of the will, decreeing that *that there was no olographic will of the deceased.*

Held that the proof was insufficient, but that the judgment should have been one of non-suit only, as the legatee may still discover and produce proper evidence of the will.

Succession of Adrien Lopez, 368.

WRIT OF ERROR FROM U. S. SUPREME COURT.

1. The writ of Error from the Supreme Court of the United States, was necessarily issued in the premises *after* the judgment of this Court had become final and definitive and produced its legal effect. Such writ of Error could not, therefore, act as a *supersedeas*, which, under the legislation of Congress and jurisprudence of the U. S. Supreme Court, is not intended to interfere with the judgment of a State Court when the latter has already received its execution, or, as in the instant case, has produced its effect.

The State ex rel. Pugh, Coroner, vs. Judge, &c., 1381.

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